



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

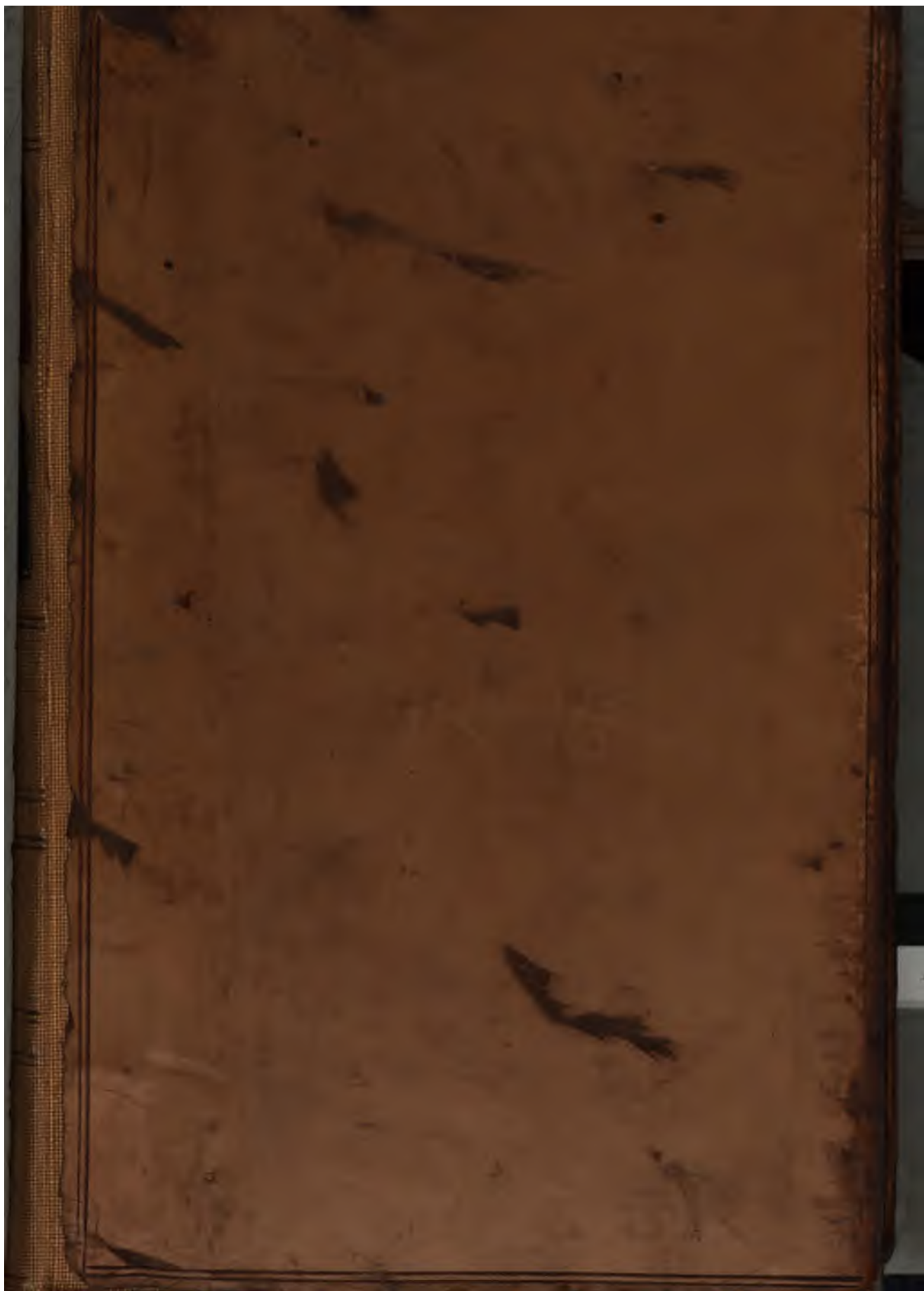
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



L. Eng. A. 75. d. 205

= L.L. D 1 1204

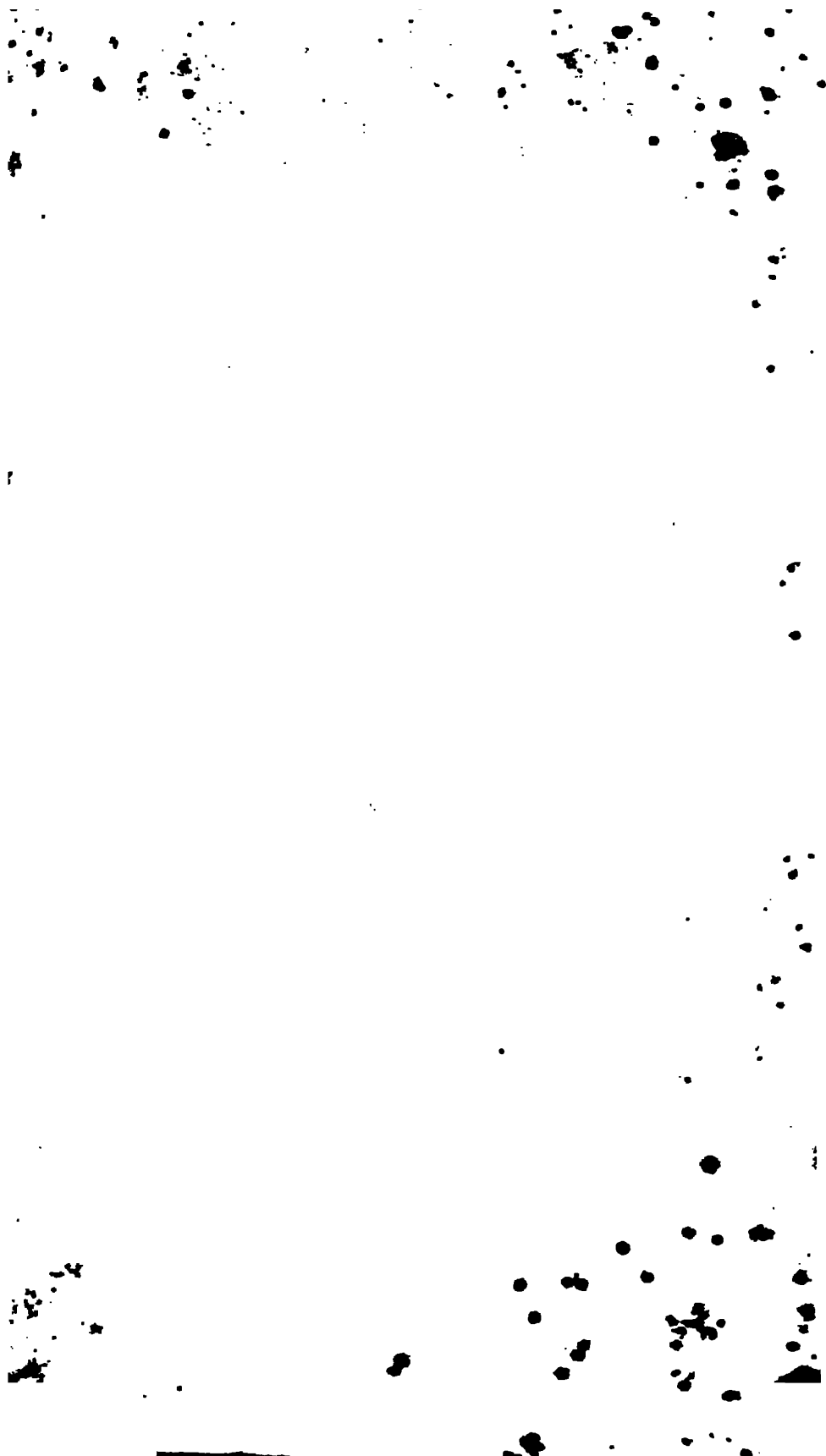
n. 2

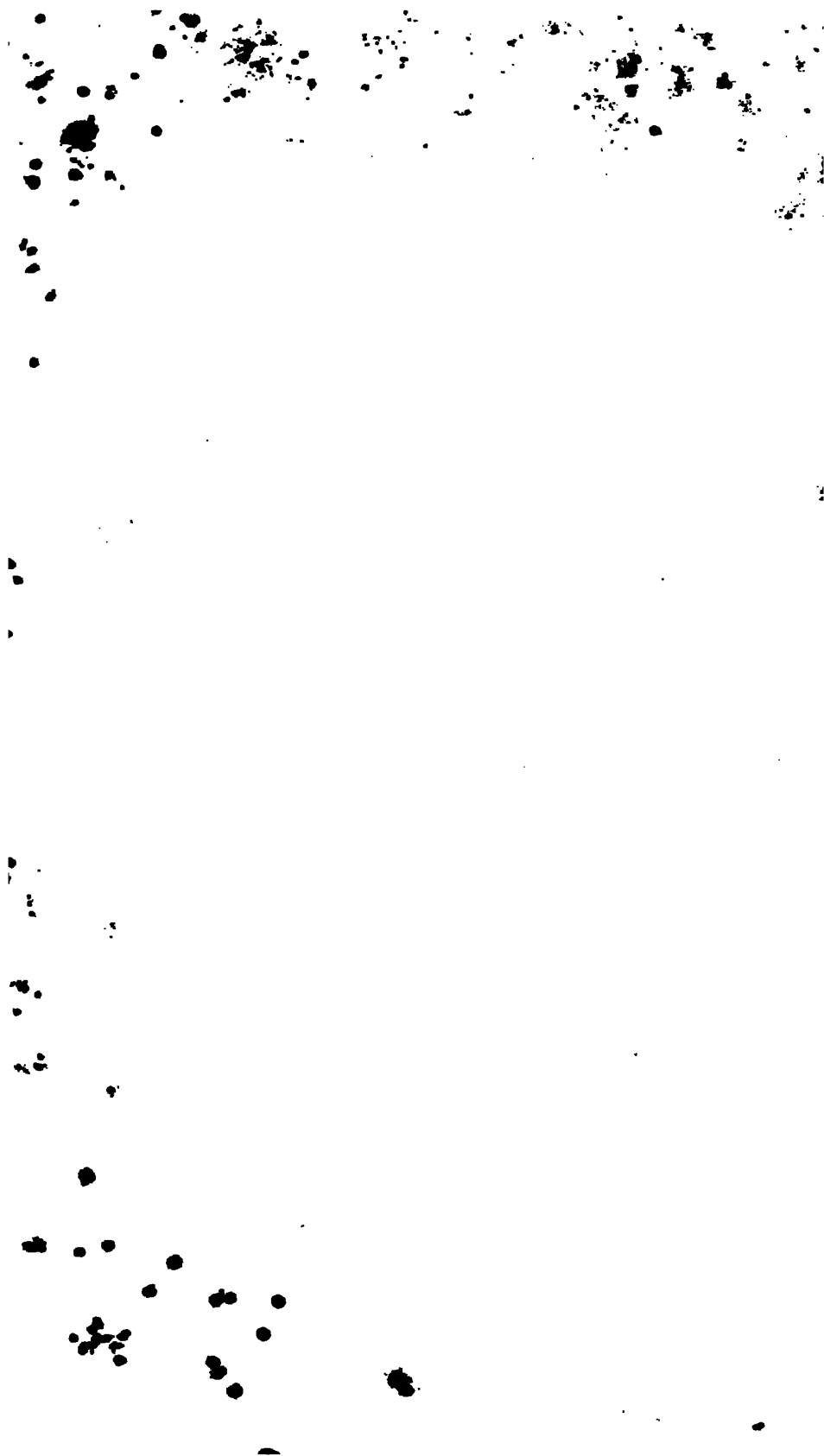
Cw.U.K.

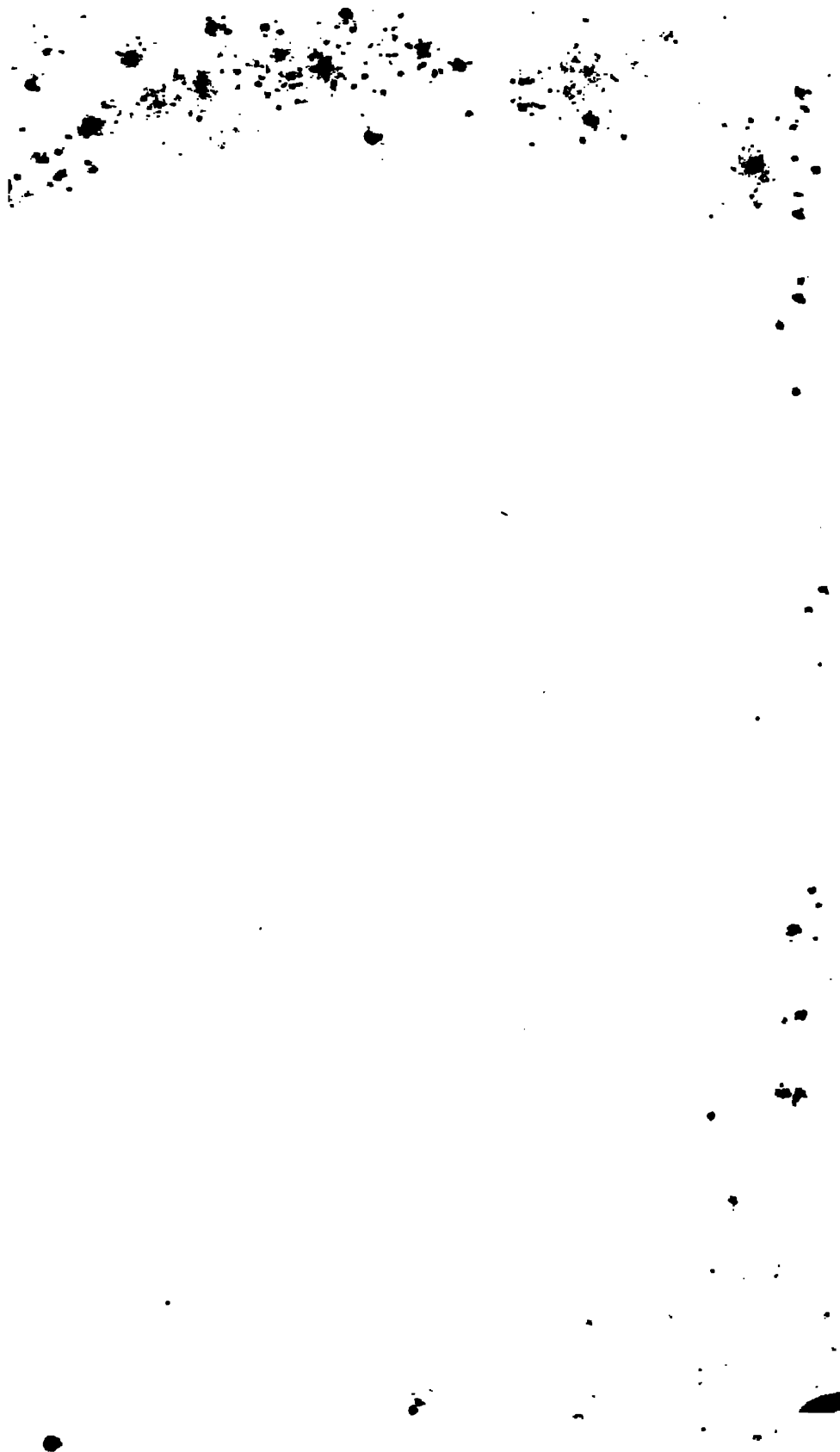
100

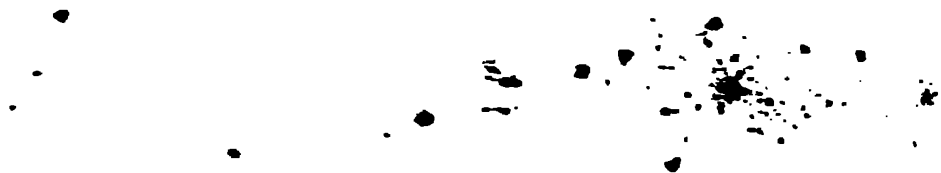
1260











THE
Authorized
REPORTS
OF
THE ROLLS COURT.

THE
Authorized
REPORTS
OF
CASES IN CHANCERY

ARGUED AND DETERMINED

IN
THE ROLLS COURT

DURING THE TIME OF THE

RIGHT HON. LORD ROMILLY,
MASTER OF THE ROLLS.

BY
CHARLES BEAVAN, ESQ., M.A.,
BARRISTER AT LAW.
AND EXAMINER OF THE COURT OF CHANCERY.

VOL. XXXV.
1865, 1866.—28 & 29 VICTORIA.

LONDON:
STEVENS & SONS, 26, BELL YARD, LINCOLN'S INN,
Law Booksellers and Publishers.
1868.



LONDON:

PRINTED BY C. ROWORTH AND SONS,
NEWTON STREET, HIGH HOLBORN.

LORD CRANWORTH,

Lord Chancellor.

LORD ROMILLY,*

Master of the Rolls.

SIR JAMES LEWIS KNIGHT BRUCE,

SIR GEORGE JAMES TURNER,

} *Lords Justices.*

SIR RICHARD TORIN KINDERSLEY,

SIR JOHN STUART,

SIR WILLIAM PAGE WOOD,

} *Vice-Chancellors.*

SIR ROUNDELL PALMER,

Attorney-General.

SIR ROBERT PORRETT COLLIER,

Solicitor-General.

* The Right Honorable Sir JOHN ROMILLY, M.R., was, on the 3rd of January, 1866, created a Peer, by the title of LORD ROMILLY, of Barry, in the County of Glamorgan.

NOTICE.—*The next Volume will contain about five Cases, together with a General Index and a Table of all the Cases reported in the Thirty-six Volumes, and thus this long series of “AUTHORIZED REPORTS” will be brought to a conclusion.*

TABLE OF CASES REPORTED.

	PAGE		PAGE
Burrell, Dickinson v.	257	Dresser, Smith v.	378
Bushill, Hale v.	343	Drew, In re	443
		Duckworth Aspinall v.	307
		Dunball v. Walters	565
C.			
Calcraft v. Thompson	559	E.	
Camoy's, Lord, Tempest v.	201	Edgware, &c. Rail. Co., The,	
Carmichael, Brett v.	340	Johnson v.	480
Carr v. Livingston	41	Edwardes v. Jones (No. 2) ..	474
Cattar, Ward v.	171	Elam, Ibbotson v.	594
Chafy, Henniker v.	124	Ellis, Down v.	578
Chard v. Cox	191	Emmerson's Case	518
Cheesman v. Price	142	England v. Lord Tredegar	256
Chubb v. Griffiths	127	English, &c. Rolling Stock Co.,	
Clark v. Wallace	460	Re The.	646
Clarkson, Arthur v.	458	Ennor, Gardener v.	549
——, Sidney v.	118	European and American Finance	
Clements v. Welles	513	Co., Ex parte	153
Coates, Armitage v.	1	Exhall Coal Co., Re	449
Collett v. Collett	312		
Commercial Bank of India, The,		F.	
Robinson and the Alliance			
Bank v.	79	Fitch, Benyon v.	570
Commercial Union Wine Co., In		Floyer, Bostock v.	603
Re The.	35	Forrer v. Nash	167
Constantinople, &c. Hotel Co.,		Foster, Partridge v. (No. 2) ..	545
Re The.	349	——, Redmayne v.	529
Cooper v. Macdonald	504	Fox's Will, Re	163
Cope v. Henshaw	420	Freeman v. Bowen	17
Cowley, Earl, v. Wellesley	635	Furness, Dalton v.	461
Cox v. Bockett	48		
——, Chard v.	191	G.	
Crafter, Lovejoy v.	149		
Craggs v. Gray	166	Gardener v. Ennor	549
Crenver &c. Mining Co., The v.		Gee v. Liddle (No. 1) ..	621
Willyams ...	353	—— v. —— (No. 2)	629
Cross v. Wilks	562	—— v. —— (No. 3)	631
		—— v. —— (No. 4)	658
D.		General Rolling Stock Co., Re	
D'Adhemar, the Viscountess v.		The.	207
Bertrand ..	19	George v. George (No. 1)	350
Dalton v. Furness	461	—— v. —— (No. 2)	382
Daubney v. Leake	311	Goodier, Bovill v.	564, 427
Davies v. Otty (No. 2)	208	Granger, Le Blanch v.	187
De Hoghton v. Money	98	Grattwick's Settlement, In re ..	215
Dent v. Dent	126	Gray v. Adamson	383
Denton v. Macneil	652	——, Craggs v.	166
Dickinson v. Burrell	257	Gresham v. Price	47
Down v. Ellis	578		

TABLE OF CASES REPORTED.

vii

	PAGE		PAGE
Griffiths v. Bracewell	43	Leach v. Leach	185
——, Chubb v.	127	Leake, Daubney v.	311
——, Summers v.	27	Le Blanch v. Granger	187
Gurner, Harman v.	478	Leigh v. Lloyd	455
		Levingston, Carr v.	41
H.		Lichfield, Earl of, Earl Howe v.	370
Hafod Lead Mining Co., Re ..	391	Liddle, Gee v. (No. 1)	621
Hale v. Bushill	343	——, — v. (No. 2)	629
Hamp v. Hamp	189	——, — v. (No. 3)	631
Hardwick v. Wright	133	——, — v. (No. 4)	658
Harman v. Gurner	478	Lilford, Lord v. Powy's, Keck	
Henniker v. Chafy	124	(No. 3)	77
Henshaw, Cope v.	420	Llewellyn v. Rous	591
Hop and Malt Co., Re The ..	273	Lloyd, Leigh v.	455
Howard, Branford v.	613	London, Hamburg, &c. Bank,	
Howe, Earl v. Earl of Lichfield	370	In re	518
Humber Iron Works Co., Re		London Wharfing Co., Re the	37
The	346	Lord v. Jeffkins	7
Humby v. Moody	549	Lovejoy v. Crafter	149
Hussey, Mullins v.	301	Ludlow v. Bunbury	36
		Lyon's Case	616
I.		M.	
Ibbotson v. Elam	594	Macdermot, Western v.	243
Insole, In re	92	Macdonald, Cooper v.	504
		——, Kermode v.	607
J.		Mackenzie v. Bradbury	617
Jeffkins, Lord v.	7	Macneil, Denton v.	652
Johnson v. The Edgware, &c.		Margetson, Brighthouse v.	303
Rail. Co.	480	Market Bosworth School, The	
Jones, Edwardes v. (No. 2) ..	474	Att.-Gen. v.	305
Joyce v. Rawlins	465	Mason, Ex parte	443
		Middlemiss, Morgan v.	278
K.		Miles v. Miles	191
Keck Powy's, Lord Lilford v.		M'Kewan, Baillie v.	177
(No. 3)	77	Money, De Hoghton v.	98
Kenyon v. Kenyon	300	Montefiore v. Behrens	95
Kermode v. Macdonald	607	Moody, Humby v.	549
Key, Scott v.	291	Morgan v. Middlemiss	278
Kitton, Re	369	Moss, In re	526
		Moss v. Barton	197
L.		Moxon, Burmester v.	310
Lake v. Peisley	125	Mullins v. Hussy	301
Lathbury, Tait v.	112		
Lathropp's Charity, Re	297	N.	
		Nash, Forrer v.	167
		Norwegian Titanic Iron Co., Re	223

O.		PAGE	
Otty, Davies <i>v.</i> (No. 2)	208	Strand Music Hall Co. Limited,	
Overman <i>v.</i> Overman	477	In re	153
		Stewart, White <i>v.</i>	304
		Summers <i>v.</i> Griffiths	27
P.		T.	
Papillon, Buckland <i>v.</i>	281	Tait <i>v.</i> Lathbury	112
Partridge <i>v.</i> Foster (No. 2) ..	545	Taylor, Re	311
Paterson <i>v.</i> Paterson	506	Tempest <i>v.</i> Lord Camoys	201
Peisley, Lake <i>v.</i>	125	Thompson, Calcraft <i>v.</i>	559
Peninsular, &c. Banking Co. ..	280	Tichener, Re	317
Percy <i>v.</i> Percy	295	Tonkin, Rowe <i>v.</i>	115
Pettinger <i>v.</i> Ambler	321	Toomb's Case	518
Pilkington, Walmesley <i>v.</i>	362	Tredegar, Lord, England <i>v.</i> ..	256
Poulett, Earl <i>v.</i> Wood	234	Trench <i>v.</i> Semple	376
Powell <i>v.</i> Boggis	535	Trollope, Alston <i>v.</i>	466
Press and Inskip, Re	34		
Price, Cheeseman <i>v.</i>	142	U.	
—, Gresham <i>v.</i>	47	Usticke, Re	338
Prince <i>v.</i> Prince	386		
Proctor <i>v.</i> Robinson	329	W.	
R.		Walker <i>v.</i> The Ware, &c. Rail.	
Railway Finance Co. Limited,		Co.	52
Re The	473	Wallace, Clark <i>v.</i>	460
Rawlins, Joyce <i>v.</i>	465	—, <i>v.</i> The Att.-Gen. ..	21
Redmayne <i>v.</i> Foster	529	Walmesley <i>v.</i> Pilkington	362
Robinson and The Alliance Bank		Walters, Dunball <i>v.</i>	565
<i>v.</i> The Commercial Bank of		Ward <i>v.</i> Cattar	171
India	79	Ware, &c. Rail. Co., The, Walker	
Robinson, Proctor <i>v.</i>	329	<i>v.</i>	52
Roebuck's Case	467	Welles, Clements <i>v.</i>	513
Rous, Llewellyn <i>v.</i>	591	Wellesley, Earl Cowley <i>v.</i>	635
Rowe <i>v.</i> Tonkin	115	Western <i>v.</i> Macdermot	243
S.		White <i>v.</i> Stewart	304
St. Cuthbert Lead Smelting Co.,		Whitwell <i>v.</i> Arthur	140
In re	384	Wickham <i>v.</i> The Marquess of	
Scott <i>v.</i> Key	291	Bath	59
Semple, Trench <i>v.</i>	376	Wilks, Cross <i>v.</i>	562
Shattock <i>v.</i> Shattock	489	Williams, Yeomans <i>v.</i>	130
Sidney <i>v.</i> Clarkson	118	Willyams, The Crenver, &c.	
Sittingbourne, &c. Rail. Co.,		Mining Co. <i>v.</i>	353
The Att.-Gen. <i>v.</i>	268	Wood, Earl Poulett <i>v.</i>	234
Slater's Case	391	Wood <i>v.</i> Wood	587
Smith <i>v.</i> Dresser	378	Wright, Hardwick <i>v.</i>	133
—, Young <i>v.</i>	87		
Smoke <i>v.</i> Smoke	396	Y.	
		Yeomans <i>v.</i> Williams	130
		Young <i>v.</i> Smith	87

REPORTS
OF
CASES
ARGUED AND DETERMINED
IN
THE ROLLS COURT.

ARMITAGE v. COATES.

1865.
Dec. 14, 15.

THIS was a special case, the effect of which and of the will itself was as follows :—

The testator *William Barton*, by his will dated in 1842, bequeathed 800*l.* and a leasehold to trustees, upon trust for his daughter *Charlotte*, the wife of *George Holloway*, for her life, and after her decease, upon trust for her children as tenants in common, as and when they should attain twenty-one, and to pay, assign and transfer the same to them accordingly. There were gifts over if there should be no issue of *Charlotte*.

Where a bequest is made to persons *in esse* for life, with remainder to their unborn children, with a general direction that the female children shall take for their "separate and inalienable use," such restriction against alienation is too remote and void. *Semble.* Under several bequests

After several other gifts, the will contained the following
to living persons for life, with remainder to their children born and unborn, with a general proviso that the shares of females shall be for their separate inalienable use:—*Held*, that the restriction against anticipation applied only to the tenants for life, in consequence of a direction for payment to the children and a proviso that their receipts should be good discharges.

1865.

ARMITAGE
v.
COATES.

lowing proviso, on which the question turned: "Provided also and I do hereby declare, that the several devises and bequests, hereinbefore by me made and given to or in favor of any female or females, shall be *for their respective separate and inalienable use*, and free from the debts, control or engagements of any present or future husband or husbands with whom she or they shall have intermarried or may hereafter intermarry; and that the receipt or receipts in writing of any or every such female or females shall, notwithstanding coverture, be a good and sufficient discharge or good and sufficient discharges for all and every sums or sum of money payable to her or them, respectively, under or by virtue of this my will, to the person or persons to whom such receipt or receipts shall or may be given for the money therein expressed or acknowledged to be received."

There were other portions of the will, preceding the proviso, affecting the decision in this case, and which were substantially as follows: The testator gave a leasehold to his wife for life, and afterwards to be sold and the produce to fall into the residue. The legacy to *Charlotte* in default of issue was given to another daughter (by name) for life, with remainder over. He gave a freehold to his daughter *Mary* for life, with remainder over. He gave 600*l.* to *George* and *Charlotte Beard* on attaining twenty-one, with gifts over; and he made other gifts to males which it is unnecessary to mention, and gave the residue to his wife for life, with remainder to a daughter for life, and afterwards to her children.

The testator died in 1842.

Charlotte Holbourn died in 1854.

In

In 1861, *Charlotte Barton Holloway*, one of the three children of *Charlotte Holloway*, married Mr. *Coates*, but no settlement was made on her marriage. She attained twenty-one in 1863, and shortly afterwards she requested the trustee to transfer to her one-third part of the 800*l.* legacy, and to assign to her one-third part of the leasehold premises.

1865.
—
ARMITAGE
v.
COATES.

The trustee was ready and willing to comply with her request if he lawfully could, but he was advised that, by reason of the above proviso, he was unable to do so with safety.

The trustee submitted, that *Charlotte B. Coates* was a female within the meaning of the proviso, and that a valid fetter had been imposed by the proviso on her vested interest.

Charlotte B. Coates, on the other hand, contended that the proviso was applicable only to females named in the will, and not to females unborn at the death of the testator and taking merely as members of a class; secondly, that as to the latter the proviso was void, as infringing the rule against perpetuities.

The questions submitted for the opinion of the Court were, first, whether the proviso in the will was valid as regarded the vested share of *Charlotte B. Coates* in the 800*l.* legacy and in the leasehold; and, secondly, whether the proviso, upon its true construction, created a restriction against anticipation.

Mr. *C. Hall* for *Charlotte B. Coates*. The restriction against alienation is altogether invalid, being too remote. The rule of law is this, that you cannot tie up property so as to make it inalienable beyond a life or lives in

1865.

 ARMITAGE
 v.
 COATES.

esse and twenty-one years afterwards; but if, after an estate to *A.* for life you give the *corpus* to *A.*'s daughters, and make their interest inalienable, even during coverture, it may restrict the alienation beyond two generations. This the law will not allow; it withdraws the property from the market beyond the permitted period, and such a limitation is void.

The point arose in *Fry v. Capper* (a), where a fund was settled on a husband and wife successively for life, with remainder to the children as they should appoint. An appointment was made to their daughters for life, but not by way of anticipation. It was contended that the restraint upon anticipation of the daughters' life interests would infringe the rule against perpetuities. Vice-Chancellor *Wood* says, "The argument on this point in *Thornton v. Bright* (b) suggests the decision to which the Court would probably come—that, if necessary, the Court would reject the limitation and treat the appointment as being a settlement for the benefit of the daughter without the restraint upon anticipation. The point is ingenious, and would deserve, perhaps, more consideration if it were open to me. However, if *Thornton v. Bright* had not decided the question, I think that I should have come to the same conclusion, independently of that authority."

In *Thornton v. Bright* (c) and *Carver v. Bowles* (d) the objection as to a perpetuity was never raised, and in *Baggett v. Meux* (e) the point did not arise, as the gift was to a person *in esse*. Here the case arises, not as to a life estate, but as to the *corpus*, which makes the case stronger. This inalienable gift to a class not *in esse*

(a) 1 *Kay*, 163.

(b) 2 *Myl. & Cr.* 236.

(c) 3 *Myl. & Cr.* 230.

(d) 2 *Russ. & Myl.* 304.

(e) 1 *Phil.* 627, and 1 *Col.* 138.

esse is contrary to the policy of the law and void, to support such a gift in favor of a married woman is beyond the power that a court of equity ought to assume, and the fetter ought to be rejected altogether.

1865.

 ARMITAGE
 v.
 COATES.

Mr. *Wickens* for Mr. *Coates*. According to the true construction of the will the clause against alienation is applicable only to the tenants for life, and not to persons taking as an unascertained class after the life estates. The will provides, that the receipts of females for the monies payable to them shall be good discharges to the trustees, and that the trustees shall "pay, assign and transfer the same to him or her accordingly." It is inconsistent with an inalienable gift that payment should be made at once of the fund, and that a transfer or assignment should be executed to them of their shares of the leaseholds.

Mr. *Robson* for the other Defendants. The proviso only applies to the persons specifically designated by name and not to a class. He cited *Dickenson v. Mort* (a).

The MASTER of the ROLLS.

I am of opinion that this proviso against alienation does not apply to the several classes of persons thereafter to be born.

Dec. 15.

The direction to pay the money to them, him or her shews that the proviso as to separate use and against anticipation is inapplicable to persons who have already received the money and who are enabled to give good and sufficient receipts and discharges to the trustees for

(a) 8 *Hare*, 178.

1865.
~
ARMITAGE
v.
COATES.

for it. It would be inconsistent to hold otherwise. But this proviso has an intelligible meaning when applied to persons living at the death of the testator.

I do not express any opinion on the point, principally argued, as to remoteness; but my strong impression is, that it would be too remote, and that this Court could never, after a life or lives in being and twenty-one years, permit any estate to be inalienable. The point, however, was new to me, and I find no decision on the subject; but the more I consider it the more I feel convinced that it would be held too remote. It would be tying up property more than a life or lives in being and twenty-one years, the proviso against anticipation being clearly a fetter against alienation.

Mrs. *Coates*, therefore, is entitled to have the money paid over, and I will answer the special case, that this proviso in question does not apply to her share in the 800*l.* or in the leaseholds.

The costs are payable out of the estate, for when the testator creates the difficulty, it is one of the charges on his estate.

1865.

LORD v. JEFFKINS.

Dec. 11, 12,
14.

DR. COCHRANE died in 1831, and his property became the subject of a protracted litigation (a).

In a suit to set aside a sale by private contract of a reversion:—

In 1841, Mrs. Barton, a widow, was entitled to half of a very considerable sum in Court, subject to the contingency of a Mrs. Moorhouse having a child. Mrs. Moorhouse was then of the age of about thirty-three years, she had married in 1826 and had no issue.

Held, that the highest price bid for it upon a previous attempt to sell it by auction was a fair test of its market value.

In August, 1841, Mrs. Barton caused a sum of 50,000*l.* Consols, part of her share of the fund in Court, to be put up for sale by auction in lots, two of which lots were of 5,000*l.* Consols each. The highest bidding for each of these lots was 300*l.* each, and they were bought in.

As to the difficulty in ascertaining the value of a reversion which is contingent on the death of a lady without issue. Whether such "issue risks" can now be insured against, *quære*.

Afterwards, in March, 1842, Mr. Jeffkins (a stranger to Mrs. Barton) agreed to become the purchaser of a contingent reversionary sum of 5,000*l.* Consols (part of the money in Court) and some interest for 750*l.* Accordingly, by an indenture dated the 4th of March, 1842, Mrs. Barton, in consideration of 750*l.* paid to her by Mr. Jeffkins, assigned to him 5,000*l.* Consols (part of the 167,808*l.* in Court), together with the dividends which would accrue thereon after the expiration of twelve years from the sale or the death of Mrs. Moorhouse, whichever event should first happen.

In ascertaining the market value of a reversion, the fact of its being the subject of a chancery suit, even though it does not affect the right to it, must be taken into consideration.

In Long delay in filing a bill to set aside the sale of a

(a) See 34 *Beav.* 220; 4 *Drew.* 366; 10 *H. of L. Cas.* 272.

reversion is not to be disregarded.

1865.

 LORD
 v.
 JEFFKINS.

In *June*, 1842, Mrs. *Barton* married the Plaintiff Mr. *Lord*, and she died in *December*, 1844. The Plaintiff Mr. *Lord* was her legal personal representative.

On the 21st of *June*, 1864, Mr. *Lord* instituted the present suit against *Jeffkins*, and against *Waterson* and *Hill* (who had purchased the 5,000*l.* from *Jeffkins*), to set aside the sale of *March*, 1842, on the ground that it was a sale of a reversion for an inadequate consideration.

Mrs. *Moorhouse* died the 23rd *September*, 1864, without issue.

Evidence was entered into as to the value of the reversion, the effect of which is sufficiently stated *post*, p. 10.

Mr. *Selwyn*, Mr. *Baggallay* and Mr. *W. Pearson*, for the Plaintiff, cited *Boothby v. Boothby* (a); *Baker v. Bent* (b); *Salter v. Bradshaw* (c); *St. Albyn v. Harding* (d); *Davies v. Cooper* (e); *Perfect v. Lane* (f).

Mr. *Hobhouse* and Mr. *L. Mackeson*, for the Defendant *Jeffkins*, referred to *Waters v. Thorn* (g); *Tynte v. Hodge* (h).

Mr. *Jessel* and Mr. *William Morris* for *Waterson*.

Mr. *Southgate*, Mr. *F. W. E. S. Everitt* and Mr. *Wakeford* for *Hill*.

The

(a) 1 *Mac. & G.* 604, and
 15 *Beav.* 212.
 (b) 1 *Russ. & Myl.* 224.
 (c) 26 *Beav.* 161.
 (d) 27 *Beav.* 11.

(e) 5 *Myl. & Cr.* 270.
 (f) 30 *Beav.* 197, and 3 *De*
G., F. & J. 369.
 (g) 22 *Beav.* 547.
 (h) 2 *Hem. & Miller*, 287.

The MASTER of the ROLLS.

I do not require a reply in this case, for, after reading over the evidence very carefully, I think the case of the Plaintiff fails.

1865.

 LORD
 V.
 JEFFKINS.
 14 Dec.

In the first place, it is important to consider the nature of the suit. It was instituted on the 21st of *June*, 1864, to set aside the sale of a reversion which took place on the 4th *March*, 1842, that is to say, more than twenty-two years before. The first question to consider is, whether a fair marketable price, the utmost that could be obtained, was given for it—whether, in point of fact, the full value of the reversion was paid for it? The burthen of proof to establish that lies on the Defendant, and it is his business to prove that he has given the full market value for it; and, upon the evidence, I think that he has shewn that he has done so.

In the first place, it is very important to consider what the subject matter of the sale was; it was the sale of 5,000*l.* Consols, to be paid on the death of *Susan Moorhouse*, who was born in *December*, 1807, and also the dividends which should accrue due after the year 1854 (twelve years after the date of the sale), subject always to the whole being put an end to by the fact of *Susan Moorhouse* having a child; for if *Susan Moorhouse* had a child, then, at once, the accumulations were stopped and the capital went over.

It is to be observed that, among several cases which were cited to me, there is only one (that is *Davis v. Cooper (a)*), in which a difficulty or contingency similar
 to

(a) 5 *Myt. & Cr.* 270.

1865.

— — —

LORD
V.

JEFFKINS.

to the present arose on the question of a sale of a reversionary interest. Lord *Cottenham*, however, got rid of it thus: he says, all the parties agreed to consider the contingency as nothing, and consequently it was simply the sale of a reversion. He then considered that the fair value had not been given for the reversion. That cannot, however, be said here; for unquestionably, in this case, the risk of the birth of a child was fully in the contemplation of the parties themselves. In looking at the evidence of the actuaries and auctioneers, and taking that alone, I have found it exceedingly difficult to come to any satisfactory conclusion on the subject. It is to be observed (and it is the constant observation both of counsel and of the Court) that the evidence given for the Plaintiff and for the Defendant in these cases is always, to some extent, biassed; for, although the witnesses are perfectly respectable gentlemen, and speak exactly what they believe to be true, yet nevertheless it so happens that the persons who give evidence in favor of one side always differ much, in their estimates of the value, from those who give their evidence in favor of the other side. That probably, in a great many cases, arises from this: that the opinions of many persons may be taken, and only those used which are favorable. In this case, the difference between the actuaries is not very great; but the difficulty I have felt throughout respecting the matter has been this:—that it has been impossible to estimate what the real value of the risk was. With the exception of Mr. *Morgan*, there is very little difference between the persons who estimate what the value of the reversion was. Mr. *Day* makes it 1,750*l.*, Mr. *Sprague* 1,609*l.*, Mr. *Hendrick* 1,680*l.*, Mr. *Pattison* 1,589*l.*, and Mr. *Williams* 1,703*l.* In fact, there is very little difference between them on this part of the subject; but there is very considerable difference in the mode in which they estimate what the risk was of the birth of a child

child to Mrs. *Moorhouse*. I must say that it appears to me extremely difficult, and I should have thought *à priori* almost impossible, to ascertain what the possibility or probability was of a lady of the age of thirty-four years and seventy-seven days having a child, she having been married to a husband of about the same age for fifteen years, and either having had no child during that time, or having had a child who was either still-born or died immediately after birth. However, the evidence is, that although such a contingency or a risk could not be insured against in 1842, yet that, in modern times, some offices have insured against risks of that description. Mr. *Day* (the actuary of the *London and Provincial Society*) says, that in his office they would insure against a risk of that description, but that the premium, in a single money payment, which they would require would be 1,300*l*. If so, it reduces the value of the reversion to far below the 725*l*. that was given, because in his case it would reduce it to about 300*l*. and odd. Then Mr. *Sprague* seems to value this risk at 402*l*., and Mr. *Hendrick* values it at 630*l*. Mr. *Williams* seems to value the chance of the birth of a child at 1,062*l*., and Mr. *Jellicoe* (a) at something like it, but the exact amount he does not state.

I can well understand that, if you can go to an insurance office to insure, by payment of a fixed premium, for the receipt of a sum of money on the happening of either of two contingent events, one being the death of a person then alive during the life of another, and the other event being that person having a child born, you might estimate the sum which ought fairly to be

1865.

 LORD
 V.
 JEFFKINS.

(a) He considered the valuations of these "issue risks" to "be to a certain extent speculative and approximate."

1865.
~
LORD
v.
JEFFKINS.

be given for the property sold subject to that risk. But in 1842 the means of so doing did not exist, and it does not clearly appear to me that it exists at this present time.

When, therefore, I meet with cases of this description, I look about to see if I cannot find some evidence to guide me in coming to a more fair or accurate conclusion than that which is merely to be drawn from the evidence of the actuaries, or that of the auctioneers, whose evidence appears to me to be less satisfactory than the actuaries, for their opinions are given on less accurate *data*. Taking this course, I find this important event, which occurred on the 27th of *August*, 1841: part of the property, consisting of the reversion in 50,000*l.*, was put up for sale by auction in eight lots, six of 5,000*l.* and two of 10,000*l.* It is suggested that I cannot proceed upon what occurred on this occasion, because that which was put up by auction was not exactly the same as was included in the sale of 1842; but I am of opinion it forms a very useful guide, and gives great information to the Court upon the subject of the value. The only difference between the two was this: that the intermediate dividends, after the lapse of twelve years, were not put up for sale by auction, but the reversion simply was put up "to be transferred upon the death of a lady now in her thirty-seventh year, if she should not bear a child, or if she should bear a child or children, but it should be decided that the vendor is entitled notwithstanding: the purchaser not to have any claim whatever upon the funds or dividends in the *interim*." Now that was not the real state of the case, but it was put much more favorably for the vendor than the real fact was, because, at the time when this was put up for sale, she was in her thirty-fourth year. Having been born in *December*, 1807,

1807, she was, in *August*, 1841, in her thirty-fourth year, but she is stated to be in her thirty-seventh year. It is clear, that the probability of a lady having a child rapidly decreases every year that she gets older, and that a lady of thirty-four is much more likely to bear a child than a lady of thirty-seven, assuming that they had both been married for fifteen years without ever having had a child.

1865.
LORD
v.
JEFFKINS.

In that state of circumstances, the result was, that the highest bidding for either of the two lots which were put up was about 300*l*. One of these was bought in for 490*l*., and the other for 480*l*. The exact sum that was bid is not given, but there was no *bonâ fide* bidding exceeding 300*l*. I hold that to be a fair test of the market value of a property of this description. This also is certain, that if they had been knocked down to the *bonâ fide* bidder for 300*l*., the sale could not afterwards have been set aside for inadequacy of consideration. The vendors thought that 300*l*. was below the value, and I think it probable that it was so. But this is always to be borne in mind in transactions of this kind, that a contingency of this description diminishes the number of purchasers, for very few persons are willing to undertake that species of risk. But does it therefore follow, that this Court must lay down such a rule as this: that a person possessed of a property of this description shall not be at liberty to sell it to any person whatever? for that is really what it amounts to. If the market value of a contingent reversion, or that which it would fetch at an auction, does not exceed 300*l*., and another person says, I am willing to give and gives 725*l*. for it, is this Court to set the sale aside, after the lapse of twenty-two years, on a fanciful notion and on the evidence of certain actuaries and the like that it was worth more than

1865.

LORD
&
JEFFKINS.

than that sum at that time? I am of opinion that it would be impossible so to do, and that if this Court so held, the result would be, that it would be, to inflict on the possessor of a property of this description the impossibility of obtaining any money whatever for it.

That this property could not well be sold by auction is established in this case, and they afterwards hunt about for a buyer amongst various sorts of persons, and find a stranger, who is willing to give 725*l.* for it. That is accepted, both parties knowing the state of the case, there being no suspicion of any undue influence and no peculiar relation existing between the parties to induce the vendor to sell the property to the purchaser, but the sale really being simply because the vendor wanted the money, as, in fact, is always the case in sales of all reversions.

I think the Court must look fairly at what, upon the evidence, was the real value of it; I think that, upon the evidence of the actuaries, that this property was not worth the 725*l.*, and the result of the attempted sale strongly confirms it. There being such a large amount of stock to be sold, it is probable that all persons who were willing to buy property of that description would be assembled on that occasion, and yet 300*l.* is the greatest amount offered for the 5,000*l.* lot.

I think also that this contingency must be taken into consideration when you are estimating the value:— The fund was the subject of a chancery suit, and though it is true that the questions to be determined in it could not affect the real right of the vendor to sell this property, or of the purchaser afterwards to obtain it, yet this was highly probable:—that a very considerable lapse of time might occur before the property could

could be obtained out of the Court of Chancery. Nay even at this moment the property has not been divided; a large portion of the *interim* dividends has been, but that was not until the year 1862. The final order for taking that out of Court was made in 1862, twenty years after this sale, and in the meantime the vendor has retained the 725*l.*, which she might have accumulated at compound interest if she thought fit, and she has not brought this matter forward until after the death of the tenant for life, when the reversion had actually fallen in.

1865.

 LORD
 v.
 JEFFKINS.

Mr. *Selwyn*, in arguing this case, said the Court will not consider the lapse of time, and cited the case of *St. Albyn v. Harding* (a), where I allowed the transaction to be set aside after sixteen years. But the circumstances were very peculiar in that case, for my disposition has not been to disregard the consequences that may follow from delay in instituting a suit. In the case of *St. Albyn v. Harding* the person who sold the reversion was exceedingly poor, the inadequacy of value was clearly proved; he had been reduced to such circumstances, that although a gentleman and educated at one of the Universities, he had been compelled to drive an omnibus, and the question between the parties was so open, that about a year before the bill was filed it was proposed that, in consideration of a certain sum of money, the claim of the Plaintiff should be abandoned and that he should confirm the sale. That went off and the bill was filed. That is very different from a case of this description, where the Plaintiff, Mr. *Lord*, knew everything that had taken place, was an active party in the whole proceeding, married the lady who sold the property three months afterwards, had been

(a) 27 *Beav.* 11.

1865.
LORD
v.
JEFFKINS.

been engaged in the chancery proceedings during the whole subsequent time, and does not file the bill till the month of *June*, 1864, that is twenty-two years and three months after the transaction had taken place.

I am of opinion that this Court must lay down as a rule, that a reversion can never be sold and that no time will operate as a bar, if this transaction will not hold good, and although there is no magic in words, yet it would be holding that there is a species of magic about a reversion, which makes the sale of it impossible except by auction, and that even if sold afterwards for even double the price that had been bid for it at the auction, yet, unless it is sold in the auction-room, this Court will not allow the sale to stand.

I have not come to that conclusion. In *Perfect v. Lane* (a), and some other cases, the Court has thought fit to confirm the sale though not sold by auction, and I think that this case is one of that description.

The case of the Plaintiff fails, and this bill must be dismissed with costs.

(a) 30 *Beav.* 197, and 3 *De G., F. & J.* 369.

1865.

FREEMAN v. BOWEN.

Dec. 7.

UNDER Mr. *Bowen's* marriage settlement, the income of his wife's settled fortune was payable to Mr. *Bowen* "until he should become bankrupt or insolvent or should die, which should first happen."

The income of a fund was payable to a trader for life or until he should become insolvent. He executed a deed of inspektorship, reciting that he was unable to pay his debts in full:—
Held, that his interest in the fund had thereby determined.

By an indenture dated in *October*, 1864, and made between Mr. *Bowen* and two inspectors and his creditors, it was recited that Mr. *Bowen* had, for some time past, carried on the business of a shipowner, and being indebted to divers persons in divers sums of money, *which he was unable to pay in full*, had proposed to his creditors to provide for the gradual liquidation of his debts by the collection and realization of all his real and personal estate under the inspection of the parties thereto of the second part. His creditors thereto granted him liberty and licence to conduct, manage and wind up his business, and to collect, get in, realize and dispose of all his real and personal estate and effects, under the inspection and subject to the direction of two inspectors, until he should have wilfully broken or failed to comply with any of the stipulations or provisions therein contained and on his part to be performed. And he entered into certain covenants with the inspectors and also with the creditors to do certain matters and things relating to the winding-up of his business and the realization of his real and personal estate and effects; and that, if the inspectors should think it desirable and require him so to do, he would convey and assign his real and personal estate to them, upon trust to realize and apply the proceeds in payment

1865.
FREEMAN
v.
BOWEN.

of his debts. And it was declared that the deed should operate as a deed of inspectorship for the benefit of all his creditors within the provisions of the Bankruptcy Act, 1861.

Mr. *Robinson* for the trustees.

Mr. *Habhouse* and Mr. *Streeten*, for the children, argued that "becoming insolvent" meant until he was incapable of paying his debts; *Re Muggeridge's Settlement* (a).

Mr. *Baggallay* for Mr. *Bowen*.

Mr. *Selwyn* for the inspectors. There has been no forfeiture; the recital is not that he is insolvent, but that he is unable to pay his debts in full until his assets have been realized, but payment of them is provided for by the deed.

The MASTER of the ROLLS.

I think that this is an insolvency, for it is impossible to distinguish between a greater or less degree of insolvency. This gentleman calls his creditors together and executes a creditors' deed, which contains a recital that he is unable to pay his debts in full, and he agrees to carry on business under inspection. I must follow the case of *Re Muggeridge* (a), and make a declaration accordingly.

(a) 29 L. J. (Ch.) 288.

1865.

THE VISCOUNTESS D'ADHEMAR v.
BERTRAND.

Dec. 15.

THE testator, *Joshua Evans*, of *Hampstead*, by his will, dated in 1861, devised and bequeathed his real and personal estate unto *Charlotte Bertrand* and *James Campbell* upon trust to realize and pay the income to *Charlotte Bertrand* for her life, and afterwards upon certain trusts, which it is unnecessary to state. The will contained no power to appoint new trustees.

A testator appointed *A. B.* (the tenant for life) and *C. D.* trustees. The will contained no power to appoint new trustees. *C. D.* having disclaimed, *A. B.* (under the powers of the 23 & 24 *Vict. c. 145, s. 27*), appointed a single trustee in his place :—*Held*, that the other *cestuis que trust* were entitled to have a third trustee appointed, and that the statute did not take away the jurisdiction of the Court to increase the original number of trustees.

The testator died in *January*, 1864, and *James Campbell* having renounced and disclaimed, the will was proved by *Charlotte Bertrand* alone.

By an indenture, dated the 16th of *July*, 1864, *Charlotte Bertrand*, by virtue of the provisions contained in the 23 & 24 *Vict. c. 145, s. 27*, appointed *Major O'Reilly*, a gentleman residing in *Ireland*, to be a new trustee of the will to act in conjunction with her.

This suit was instituted by the *cestuis que trust* for the administration of the estate, which was of very considerable amount.

Mr. Selwyn and *Mr. Sheffield*, for the Plaintiffs, asked that a third trustee might be appointed. They said that, without making the slightest imputation on the present trustees, a third trustee was necessary for the protection of the Plaintiffs' interests.

Mr. Baggallay and *Mr. Eddis*, for *Mrs. Bertrand*;

c 2

argued

1865.
VISCONTESSE
D'ADHEMAR
v.
BERTRAND.

argued that as the testator had thought proper to commit the care of his property to two trustees, it was not the course of the Court to increase the number. Secondly, that, by the act of parliament, the power was limited, that the new trustees could only be appointed in the place of those whose office was vacant, and that consequently there was no authority given to increase the original number.

The MASTER of the ROLLS.

The Court never commits a trust to the care of a single trustee, even in cases where no more than one was originally appointed.

In this case, I think the Plaintiffs are entitled to have an additional trustee appointed. I also think that the act of parliament, which has been referred to, does not take away the jurisdiction of the Court to increase the number of trustees when necessary.

If I allowed this lady to appoint a single trustee, she might appoint any person she thought fit, and one who might be very unfavorably inclined towards the other *cestuis que trust*, and thus deprive them of the protection to which they are entitled.

The Plaintiffs are entitled to have a third trustee appointed.

1865.

WALLACE v. ATTORNEY-GENERAL. (No. 2.) (a).

June 29.
Nov. 3.

THIS case came before the Court upon an adjourned summons.

Mr. Schomberg, for the English executor, referred to the statute 43 *Elizabeth*, c. 4, statute 31 *Henry* 8, c. 13, in regard to the meaning of the word "hospitals."

Mr. Selwyn, Mr. Wigram, Mr. Cole, Mr. C. Hall, Mr. A. Bailey, Mr. Bagshawe, Mr. Hobhouse, Mr. G. O. Morgan, Mr. Jessel, Mr. Rawlinson, Mr. E. F. Smith, Mr. Ware, for the classified claimants.

Held, in construing a legacy "*aux hospices de Paris et de Londres*," in the will of a person domiciled in France, and in regard to those in London, that the word "*hospice*" was to be construed strictly according to its meaning in France, and that the word "*hospice*" in French was not equivalent to "*hospital*" in English. Under a French bequest "*aux hospices de Londres*:"—*Held*, upon an examination of French authorities, that all those institutions in London were included in the bequest which gratuitously received within their walls and

The MASTER of the ROLLS.

3. The question to be determined on this summons, which is adjourned from Chambers, is, the meaning of the following bequest in the testator's will, which is written in the French language, viz. :—

"Je donne et lègue tous les objets et valeurs dont je n'ai pas disposé ci-dessus aux hospices de *Paris* et de *Londres*, que j'institue à cet effet pour mes légataires universels."

In other words, the question I have to determine is, what

(a) Reported 33 *Beav.* 384.

provided for persons unable to take care of themselves, either from old age combined with poverty, infancy combined with neglect, from mental incapacity, or by reason of any bodily ailment not susceptible of cure. *Held*, consequently, that *St. George's Hospital* and the like, *Christ's Hospital* and other institutions for instruction, and the *London dispensaries*, were excluded from the benefit of the bequest.

1865.
WALLACE
v.
ATT.-GEN.
(No. 2.)

what English institutions are included in the words "*les hospices de Londres*;" the same word is applied both to *Paris* and *London*, and must, in my opinion, receive the same interpretation, and, consequently, the words "*hospices de Londres*" must include such institutions as, if they were situated in *Paris*, would fall within the description of "*les hospices de Paris*."

With respect to that portion of the bequest which relates to "*les hospices de Paris*," the question before me cannot arise, because, by the law of that country, all bequests in favor of charity are brought into one common fund, and applied by a central board termed "*L'Administration de l'Assistance publique*." It is not, in that country, competent for a testator to select one particular hospital or almshouse at *Paris* and give a bequest exclusively to that charity. If given, it belongs to the general fund, and the persons who administer it apply the proceeds as they think fit. The question therefore is confined to *London* institutions, and, in my opinion, only those institutions in *London* which, if they were situated in *Paris*, would be termed "*des hospices*" are entitled to share in the bequest.

Having stated thus much, it is also proper to state, by way of preliminary remark, that, in my opinion, the fact that any institution in *London* is called "*hospice*" does not, of itself, give it any claim to be admitted; it must, in order to share in the bequest, fulfil the conditions of what is meant by the word "*hospice*" in French. The consequence of this opinion of mine is, that it is wholly unnecessary to consider, for the purpose of deciding this question, what institutions would fall within the meaning of the words "*hospitals of London*," unless it could be first established that the word "*hospice*" was accurately and precisely rendered in English by the word

word "*hospital*." My opinion is, that the word "*hospice*" in French is not accurately an equivalent to the word "*hospital*" in English, and this relieves me therefore from the necessity of considering the extent of the meaning of the word "*hospital*," or its variation from former periods of time, when the word included almshouses and places of instruction, such as *Christ's Hospital*.

1865.

WALLACE
v.
ATT.-GEN.
(No. 2.)

On examining the meaning of the word "*hospice*," I find that, in all accurate writers, a distinction is made between "*hospice*" and "*hopital*." I do not, by this, mean to say that they are never used as equivalent expressions or nearly so, but that, in all the cases that I have been able to discover, especially where the discussion has been relating to charities, a marked distinction has been made between "*les hospices*" and "*les hopitaux*."

In the reports and statements of accounts rendered annually by the "*Administration générale de l'Assistance publique*" this distinction is constantly and rigidly preserved. I have consulted a large number of them, and I find no instance in which, as it appears to me, these terms are applied indiscriminately.

In the lists of bequests which accompany these accounts, I find that where donations are made to *hospitals* alone, the word "*hospices*" does not occur in the heading of the list; and where the bequests are to *hospices* and the *hospitals* are not included, the word "*hopitaux*" is excluded from the title. In one of them, that of the year 1849, which contains "*Notes et renseignements sur les hopitaux et hospices civils de la ville de Paris*," rendered necessary apparently by the alteration produced by the revolution of 1848, occurs the following

1865.

WALLACE
v.ATT.-GEN.
(No. 2.)

following passage, as an explanation of what is meant by the word "*hospice*":—

"On désigne, sous le nom d'hospices, les asiles ouverts à tous ceux que l'indigence et la vieillesse, l'enfance et l'abandon, l'aliénation ou des infirmités incurables mettent hors d'état de pourvoir eux-mêmes aux besoins de leur existence. On les subdivise en hospices, proprement dits, et en maisons de retraite. L'admission est gratuite dans les premières, et, dans les seconds, elle n'a lieu que moyennant une pension annuelle ou le versement d'un capital dont le montant est fixé par les règlements."

This I translate thus:—"Under the name of *hospice* are designated abodes which are open to all those who, by poverty and old age, by infancy and neglect, by mental alienation or by incurable disease, are unable of themselves to provide the means of existence. They are divided into *hospice*, properly so called, and into asylums. In the former, the admission is gratuitous; in the latter, it is conditional on payment of an annual or of a principal sum of money, the amount of which is fixed by the rules of the institution."

In the *Nouveau Formulaire Magistral*, relating to the charitable institutions of *Paris*, by *Bouchardat*, which is a standard work and has reached its thirteenth edition, occurs the following passage:—"Dans la description des Etablissements de l'Administration, je suivrai la division actuellement adoptée dans les comptes annuels: 1°. Hôpitaux; 2°. Hospices; 3°. Etablissements Spéciaux. Les établissements aux malades sont désignés plus particulièrement sur le nom d'hôpitaux, et nous appliquons le nom d'hospices aux maisons consacrées à l'enfance, à la vieillesse, ou à des infirmités qui ne sont pas susceptibles de guérison." The meaning of which

which I understand as follows:—"In the descriptions of the institutions under the control of the public administration, I shall follow the division at present adopted in their annual reports: 1st. Hospitals; 2ndly. Hospices; 3rdly. Establishments of a Special Character. The establishments devoted to the sick are more particularly designated by the name of 'hôpital,' and we apply the name of 'hospices' to houses devoted to children, to old people, or to persons afflicted with incurable infirmities."

1865.
WALLACE
v.
ATT.-GEN.
(No. 2.)

The third division, of Establishments of a Special Character, seems to include, principally, assistance given to the objects of the charity without receiving them into any house or building. These definitions of the meaning of the word "*hospice*," although not identical, are in substance the same.

I am of opinion that the word "*hospices*," as applied to institutions in *London*, must be taken in the sense here described. I find, by consulting many volumes of the *Moniteur*, in the places referred to in the index under the words "*hôpitaux*" and "*hospices*," that they are always kept distinct, and that this division uniformly prevails. It is, however, but fair to add, that in the list of hospitals I have discovered institutions which, according to the definition I have given, are properly *des hospices*, and also that the hospital for lying-in women is, in one list, called *L'Hospice d'Accouchement*, while it is obvious that, according to the previous definitions, if correct, that institution ought to be classed among the hospitals and not among *les hospices*. Still, in my opinion, this, although it may not always have been strictly followed, is the proper definition to guide me, and I shall, unless a contrary intention is to be discovered from the text of Lord *Henry Seymour's* will, hold, that the word "*hospices*" must

1865.

WALLACE
v.ATT.-GEN.
(No 2.)

must be construed by the strict meaning of that word in the French language, according to the definition I have adopted as applied to the *London* institutions.

The rest of the will throws no further light on the subject than is to be gathered from the following passage, where he says—

“ Je donne et lègue à M^{lle} *Ellen Minchin*, à condition qu'elle ne se mariera pas, usufruit sa vie durant de la somme nécessaire pour lui assurer un revenu de dix mille francs par an ; la nue propriété de cette somme appartiendra à l'*Hospice des Lunatics de Londres*, auquel je fais don et legs.”

But this, in truth, does not affect the former definition, and is, indeed, rather a confirmation of the conclusion to which I had previously come, as an institution for persons of unsound mind falls within the strict definition of the word “*hospice*” to which I have referred.

I shall therefore hold, that all those institutions are included in this bequest which gratuitously receive within their walls and provide for persons who are unable to take care of themselves, either from old age combined with poverty, or infancy combined with neglect, from mental incapacity, or by reason of any bodily ailment which is not susceptible of cure. That, in my opinion, is the best and most accurate meaning and construction I can give to the word “*hospice*” as employed in the will of Lord *Henry Seymour*.

The result of this will be, at once to exclude from any interest in this bequest all those institutions in *London* which are usually called hospitals which are founded for the reception of sick persons, the inmates in which are discharged alike from the hospital when they are cured,

or

or when it is discovered that the disease is lingering or incurable. This includes the great *London* hospitals: such as *Saint Bartholomew's*, *Saint George's*, and the like. It will also exclude all the institutions, whether called hospitals or not, the principal object of which is instruction: such as *Christ's Hospital*. It will also exclude all institutions which do not receive persons within their walls: such as dispensaries. It will also exclude all institutions which do not receive the inmates gratuitously.

The MASTER of the ROLLS then discussed the merits of the several claimants mentioned in the Chief Clerk's special certificate; but the matter was remitted to chambers.

1865.
WALLACE
v.
ATT.-GEN.
(No. 2.)

SUMMERS v. GRIFFITHS.

1866.

Nov. 10

BY deed, dated the 18th of *July*, 1853, *Mary Lloyd* (since deceased), in consideration of 40*l.* conveyed a tithe rent-charge of 8*l.* per annum, issuing out of a farm called *Colston*, to the Defendant *William Griffiths*, "his heirs and assigns."

Sale, by an old woman of eighty-eight, of an estate in possession for one-fourth its value set aside, she being in distress and without legal assistance, and being also under the impression that she could not make out a good title, while the purchaser, knowing that she could, concealed the fact from her.

Mary Lloyd, an old illiterate widow, was then in her eighty-ninth year, but in possession of all her faculties, and she kept a public-house in *Fishguard*. One witness represented her as being very correct in business, "and very much alive to her own interests in money matters. She was a very intelligent and clear-headed woman, and, having regard to her advanced age, sharp and active, both in mind and body." She had no professional advice on the occasion, and the deed was

prepared
The doctrine
of suppression
veri applied to a purchaser.

1866.
SCHMERS
v.
GRIFFITHS.

prepared by the Defendant's solicitors. The value of the fee-simple of this tithe rent-charge (if a good title were shewn to it) was admitted to be twenty-years' purchase or 160*l*.

Mary Lloyd died in *May*, 1862, having left her property to her son *William* for life, with remainder to his children. He became bankrupt in 1863, and the Plaintiff was his assignee.

The Plaintiff instituted this suit in *March*, 1864, against *William Griffiths* and the son's children, to have the deed of 1853 set aside on the ground of fraud. The bill proceeded on the ground that *Mary Lloyd* intended to sell the rent-charge during her life only, while the conveyance was of the inheritance, but it also alleged that the consideration was inadequate.

The account of the transaction given by the Defendant *Griffiths* in his answer was as follows: "Prior to the month of *June*, 1853, *Mary Lloyd* had repeatedly offered to sell to me, and as I believe to several other persons, the rent-charge; but I had invariably declined her offer, for I was under the impression that tithe rent-charges belonged to the church, and therefore that it was not in her power to dispose of the tithe rent-charge, although I afterwards came to understand that lay people could hold such property. On or about the 23rd day of *June*, 1853, *Mary Lloyd* called at my house and strongly urged me to purchase the tithe rent-charge, saying, in the Welsh language, "I am pressed for money, take mercy on me, and let me pay my debts." I inquired of her why she did not go to some person who knew more about such property? To which she replied, that she had done so, but that, not having the conveyance to her husband, she could not shew any

any title to the rent-charge, and that therefore no one would purchase it of her. I remarked to her, that if she had no title, perhaps her husband had none; but she stated that the farm on which the tithes were charged was her own, and that she had never paid tithe to any one since the death of her husband; and that if I would give her 40*l.* and put her to no expense about the title, she would sign any deed I liked making over to me all her interest, whatever it might be, in the tithes. On the assurance of *Mary Lloyd* that she had paid no tithe in respect of the said lands, I concluded that she must have some sort of right or title to the rent-charge, either as owner or lessee; and as I was willing to oblige *Mary Lloyd*, and the amount of the risk, in case the title should prove bad, was not great, I accepted the offer of *Mary Lloyd*, and agreed to purchase the rent-charge for 40*l.*, without further inquiry as to the title, and to pay all expenses attending the conveyance."

1866.

 SUMMERS
 v.
 GRIFFITHS.

On his cross-examination, the Defendant *Griffiths* stated as follows :—"When she came to me in 1853 to ask me to buy the tithes, she begged and craved of me to take mercy upon her; this she said in Welsh. I said to her that I thought it was a spiritual thing and belonged to the church, and that she had no right to sell that. 'Yes,' she said, 'I have a right to sell it.' She said she had it after her husband's death. She shewed me her husband's will, I read the will, and I then said I would give her what she asked for it, 40*l.* I said, why do not you offer it to some one else? She said, I have no deeds, and they are afraid of the title to it. She never asked more than 40*l.* for it, and had, over and over again, offered it to me for that sum before I bought it."

A copy

1866.

 SUMMERS
 v.
 GRIFFITHS.

A copy of the will of *Mary Lloyd's* husband was given to Mr. *Griffiths*, and it was recited in the conveyance to him. This will was dated in 1819, and thereby he devised the tithes of *Colston* to *Mary Lloyd*, "her heirs and assigns for ever." *Mary Lloyd's* husband had died in 1823, and the will had been proved in 1824; this also was recited in the conveyance.

Mr. *Selwyn* and Mr. *Speed*, for the Plaintiff, relied on *Clark v. Malpas* (a), *Baker v. Monk* (b), *Longmate v. Ledger* (c).

Mr. *Robinson* for Defendant in the same interest.

Mr. *Owen* for trustees.

Mr. *Jessel* and Mr. *Bevir* for the Defendant *Griffiths*. The case made by the Plaintiff on the record is one of fraud; it proceeds on the fact that the vendor only intended to sell her life interest in the rent charge, and that the deed improperly conveyed the inheritance. That case has been displaced, and the Plaintiff now relies on a distinct one. There was no fiduciary relation between the vendor and purchaser in this case, no surprise or misrepresentation; but there being a difficulty in the title, the vendor obtained the price which she herself had fixed. The absence of an attorney on the vendor's part is no ground for invalidating a sale; *Harrison v. Guest* (d).

The case is then reduced to one to avoid a deed merely for the inadequacy of the consideration. That
 has

(a) 31 *Beav.* 80.

(b) 33 *Beav.* 419.

(c) 2 *Giff.* 157.

(d) 6 *De G., M. & G.* 424,
 and 8 *H. of L. Cas.* 481.

has been repeatedly decided to be no sufficient ground for annulling a conveyance of property in possession.

1866.
SUMMERS
v.
GRIFFITHS

The MASTER of the ROLLS (without calling for a reply) said—

I am of opinion that the Plaintiff is entitled to a decree.

The state of the case, as put by the Defendant himself, is, that an old woman, of the age of eighty-nine, in distress for money, and having a doubt about the title to the property, comes to him and asks him to buy it at one-fourth or one-fifth of its value; and that she, having no species of legal assistance of any sort, makes that offer to him. He assents, and buys it at that amount, having at the time in his hands the title to her property, and knowing or having the means of knowing exactly what her title was, and having told her, at first, that she could make no title to it, or that if she was entitled to it her husband probably was not, he having the deed probably shewing how long the husband had had the property, and that she had then had thirty years' uninterrupted possession of the rent-charge. Thereupon he buys the property for one-fourth its value. This is the most favorable mode of stating the case, and I am then asked to say, that if the matter were fresh, this is a transaction which can be supported, and the only reason urged why it can be supported is that the bill charges fraud. No person, I think, has been more strict than I have in endeavouring to repress the improper uses of the word "fraud" in regard to transactions which are neither of an improper nor of an immoral character,—I mean immoral in the sense of taking advantage of a person who does not know what the value of his property is. I do not understand the distinction on the subject taken in the case of *Harrison v. Guest*.

1866.

 SUMMERS
 v.
 GRIFFITHS.

v. *Guest*. There appear to me to be distinct fraud in this case, and on that ground I am of opinion that the Plaintiff is entitled to recover.

It is true the Plaintiff has put forward another case on the bill, which is, that *Mary Lloyd* intended to sell her life interest only, and there is some ground for that suggestion on the evidence; but here is this man, who knows everything about the title, and who admits (in the state of circumstances I have mentioned) that he allowed this old woman to sell the property to him for one-fourth its value, she believing there was a defect of title. If that be not fraud I am at a loss to know what the meaning of the word "fraud" is, in the proper and legal sense of the word. If a person comes to me and offers to sell to me a property which I know to be of five times the value he offers it for, he being ignorant of his rights and in the belief that he cannot make out a title, while I know that he can, and I conceal that knowledge from him, is not that a *suppressio veri*, which is one of the elements which constitute a fraud?

I am of opinion that the Plaintiff in this case is entitled to a decree to set this deed aside, on payment to the Defendant of the principal sum and interest after deducting the tithes he has received. The Plaintiff must pay the costs of the other Defendants, because, in my opinion, they ought all to have joined as co-Plaintiffs.

There is this also to be observed with respect to the question of time, that ten years have elapsed, and this old lady took no steps in her lifetime. She died in 1862, and neither the son nor his assignee took any steps until *March*, 1864, when the bill was filed. But, then,

then, I observe that there are persons who are interested in remainder, some of whom are infants and cannot be bound by that lapse of time, though it is absolutely necessary that there should be some limit to these cases.

1865.
SUMMERS
v.
GRIFFITHS.

It is true, as Mr. *Jessel* says, that mere inadequacy of value is not a sufficient ground for setting aside a transaction. But how far is that to go, is there to be no such inadequacy of value as can amount to evidence of fraud? Lord *Thurlow* said, that to set aside a conveyance, there must be an inequality, so strong, gross and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it (a). Tried by this test, I am satisfied that most men of common sense would exclaim at the inequality, when they found that an old woman of eighty-nine had sold property for one-fourth of its value because she was in distress, and that without any legal assistance and without any person letting her know that she could make out a good title and obtain four or five times that amount.

(a) *Gwynne v. Heaton*, 1 Bro. C. C. 9.

1865.

*Re* PRESS AND INSKIP.

Nov. 20.

Twelve months
after payment
of a bill of costs
by trustees
to their soli-
citor it cannot
be taxed,
under the 1
& 2 Vict.
c. 73, upon
the application
of their *cestui*
que trust.

WILLIAM DAVID JONES assigned his property to trustees for the benefit of his creditors. On the 16th of *June*, 1864, the trustees paid their solicitor's bill, and an application being made, in Chambers, more than twelve months afterwards by the *cestui que trust*, under the General Order of *August*, 1864, for the taxation of the bill, it was referred into Court.

Mr. *Speed*, in support of the application, relied on the 6 & 7 Vict. c. 73 ss. 39, 41.

Mr. *Hemming*, *contrâ*, was not heard.

The MASTER of the ROLLS.

The principle is quite clear, that a third party coming to tax a solicitor's bill can only stand in the shoes of the client, and, unless there are circumstances which would entitle the client to a taxation, the third party cannot tax the bill as against the solicitor. Assuming, that, in this case, it was improper for the trustees to employ one firm at *Bristol* and another in *London*, still that is a question between the trustees and their *cestuis que trust*, and not one arising between the trustees and their solicitors. If the trustees thought fit to employ a firm at *Bristol* and another in *London*, they must pay them. It is a question between the trustees and their *cestui que trust*, and it can only be determined by the
cestui

cestui que trust filing a bill against the trustees to take the account between them. The Court will then see whether the payment by the trustees to their solicitors was a proper one, and if not, it will moderate the charges and deduct the amount, not from the solicitors' but from the trustees.

1865.

Re
PRESS
AND
INSKIP.

NOTE.—See *Re Massey*, 34 *Beav.* 463.

In re THE COMMERCIAL UNION WINE
COMPANY.

AN order for winding-up this company having been made on the 11th of *December* last,

Mr. *W. Terrell* now applied *ex parte*, under the 100th section of "The Companies Act, 1862" (25 & 26 *Vict.* c. 89), that the late manager of the company might deliver to the Official Liquidator some dock warrants.

Dec. 15.

The Court will not, under the 25 & 26 *Vict.* c. 89, s. 100, make an order *ex parte* for the delivery over of documents by the manager of a company to the Official Liquidator.

The MASTER of the ROLLS.

I cannot make such an order *ex parte*.

1865.



LUDLOW v. BUNBURY.

Dec. 8.

Devise of real and personal estate to *A.* absolutely, with a proviso that *A.*'s interest should cease if *B.* or his wife or their children should become entitled to any part of the estate by gift, sale, &c. from *A.* :—*Held*, that the clause of forfeiture was void.

BY her will, dated in 1860, Mrs. *Bunbury*, by virtue of a power, appointed all her real and personal property unto her husband "*Henry Mill Bunbury*, his heirs, executors, administrators and assigns absolutely."

She then proceeded as follows :—

"Nevertheless, the appointment, gift, devise and bequest hereby made are made upon this express condition :—that in case *Louis Robert James Versturme* and *Anne Elizabeth* his wife, or either of them, or any child or children or issue or descendant or descendants of them the said *Louis Robert James Versturme* and *Anne Elizabeth* his wife, or either of them, shall, by gift, sale, contract, devise, bequest, settlement or other instrument, made or executed by or on the part or behalf of my said husband, become, or, but for this present provision, would become, entitled to or in any manner interested in all or any part of all or any of the real or personal estate hereby by me appointed, given, devised or bequeathed, then and in such case and immediately thereafter, the whole estate and interest of my said husband, in all the real and personal estate hereby by me appointed, given, devised and bequeathed, or intended so to be, *shall cease and absolutely determine.*"

The testatrix died in 1864. The trustees were advised that, having regard to the condition contained in the will, they could not safely transfer the property unto the husband, and they instituted this suit to obtain the directions of the Court.

Mr. *Selwyn* and Mr. *Henry F. Shebbeare* for the
Plaintiffs.

1865.

LUDLOW

v.

BUNBURY.

Mr. *Hobhouse* and Mr. *Lindley* for the Defendant
Henry Mill Bunbury.

The MASTER of the ROLLS held that the clause of
forfeiture was void, and that *Henry Mill Bunbury* was
absolutely entitled to the estates, funds and monies.
He ordered a conveyance and transfer of them to Mr.
Bunbury accordingly.

Reg. Lib. 1865, B., fol. 2523.

Re THE LONDON WHARFING AND WARE-
HOUSING COMPANY (LIMITED).

Nov. 25.

THIS company was incorporated in *December*, 1863.

The Petitioner, Mr. *Mooney*, was one of the projectors,
and in *December*, 1863, he had been appointed the
managing director and secretary. He also held original
shares in the company.

The fact of a
company
having neg-
lected to pay a
debt three
weeks after
demand made,
under the 25
& 26 Vict.
c. 89, s. 79, 80,
is not sufficient
to entitle the
creditor to a
winding-up
order, unless
it be shewn
that the com-
pany is also
unable to pay
its debts.

In *February*, 1864, at a meeting of shareholders, the
100*l.* shares were converted into shares of 20*l.* each.
The Petitioner exchanged his twenty-five 100*l.* shares
for one hundred and twenty-five 20*l.* shares.

On

Where a debt is disputed by a company, a petition by the creditor to wind it up will
not be allowed to stand over, unless it is believed that when the debt has been esta-
blished by a judgment, such judgment could not be enforced against the company.

1865.

Re
THE LONDON
WHARFING
AND WARE-
HOUSING CO.
LIMITED.

On the 3rd of *May*, 1865, the Petitioner's appointment was cancelled as from the 31st of *May*; but he continued to act until the 27th of *July*.

The Petitioner, on the 12th of *October*, 1865, sent in a claim against the company for 593*l.* 16*s.*, which was composed of 343*l.* 16*s.* for his preliminary expenses and 250*l.* for six months' salary. The company declined to pay it, and after the expiration of three weeks, the Petitioner presented a petition to wind up the company.

There was no proof of any insolvency of the company, and the only fact alleged as to its financial difficulties was, that the company had expended 125,559*l.* on capital account, while the paid up capital amounted to 120,500*l.* only, and that a considerable sum was due for the purchase of the land. The Petitioner also submitted that this conversion of the shares was *ultra vires*, that the 20*l.* shares had been illegally issued, and that, therefore, the company could not enforce the payment of any calls upon them.

Mr. Selwyn and Mr. Graham Hastings in support of the petition. The old law, giving a direct remedy against the shareholders, has been abrogated, and at present the proper mode of obtaining payment of a debt due from a company is under the 25 & 26 *Vict.* c. 89, ss. 79, 80, which enacts that a company may be wound up whenever it "is unable to pay its debts," and one of the tests is, whenever a creditor of the company above 50*l.* has demanded payment, "and the company has for the space of three weeks," &c., "neglected to pay such sum." This is precisely what has taken place. It is not necessary, as a preliminary, to go through the process of proving a debt at law, it is sufficient to establish it in equity. Here it is plain that there is a debt, to some extent, due to the Petitioner from the company

company,—for, in the first place, the Petitioner was entitled to twelve months' notice; *Beeston v. Collyer* (a); and, secondly, he is entitled to be paid two months' salary for the two months he has performed the duties of his office since his discharge in *May*, 1865. There is no *bonâ fide* dispute as to the existence of some debt, and that it remains unsatisfied after the three weeks' notice. To the claim for two months' salary no answer has been given.

1865.

Re
 THE LONDON
 WHARFING
 AND WARE-
 HOUSING CO.
 LIMITED.

Secondly, where there is a *bonâ fide* dispute as to the existence of the debt, and the case turns upon the question whether there is a debt, the Court (says Lord Justice *Turner*) "would do well to exercise the power given to it by the 86th section of the act, to adjourn the petition till the existence of the debt is established;" *Re The Catholic Publishing, &c., Co.* (b).

Thirdly, the company had no power to make any alteration in the amount of their shares; 25 & 26 *Vict. c. 89, ss. 12, 13, 176*. In the case of the *Contract Corporation Company (Limited)* an application was made during this year (1865) to parliament for liberty to reduce the value of their shares from 100*l.* to 50*l.*, but the bill was thrown out in the House of Lords. The existing shares in this company are therefore illegal, and no calls can be made upon them. It is therefore "just and equitable" either that the company should be wound up or that the petition should stand over.

Mr. Hobhouse and *Mr. Colt* were not called on.

The MASTER of the ROLLS.

I am of opinion that the Petitioner has no case at all, and that, when there is simply a disputed debt, it is
 not

(a) 4 *Bing.* 309.

(b) 2 *De G., J. & S.* 121.

1865.

Re
THE LONDON
WHARFING
AND WARE-
HOUSING CO.
LIMITED.

not a legitimate object to present a petition to wind-up a company.

What was done in the *Catholic Publishing Co.* was this:—There was strong evidence of its being in a state of financial difficulty, the debt was disputed, and if it had been admitted to be due, the company was not then in a situation to pay it. I therefore ordered the petition to stand over to see if the company would, in the meantime, pay the debt (a). But if a company is able to pay, the fact of its disputing a debt or of not paying it, is no justification for a creditor to come by petition to wind it up.

I have heard no evidence to shew that the company is unable to pay its debts or that there is any debt which it is unable to pay. It refuses to pay the Petitioner, who claims a debt of 593*l.*, of which 343*l.* are for “preliminary expenses in connection with the formation of the company” in 1863, and which he has never enforced from that time to the present; the remaining 250*l.* is for six months’ salary, and this claim is disputed, and I infer that there is a question whether the company had a right to dismiss him or not. The Petitioner must take proper proceeding to enforce his debt at law.

I will not order the petition to stand over in the meanwhile, for if he should succeed at law he will then be able, by means of the judgment, to enforce payment by the company. A petition is ordered to stand over only in those cases in which it is believed that, if the debt be established by a judgment at law, such judgment cannot be enforced against the company.

The Petitioner, as shareholder, has shewn no ground
for

(a) 33 *L. J., Ch.* 325.

for winding up the company. As to the question as to the conversion of shares, it is one which must be tried elsewhere.

This is an attempt to extort the payment of a disputed debt, the validity of which ought to be tried before another tribunal, and the consequence is, that I must dismiss the petition with costs.

1865.

Re
THE LONDON
WHARFING
AND WARE-
HOUSING Co.
LIMITED.

CARR v. LEVINGSTON.

Dec. 14.

THE testator, Mr. *Levingston*, being possessed of a copyhold called "*The Blue Coat Boy Tavern*," which he had let to Mr. *Roseblade* for a term expiring in 1873, made his will in 1861. He thereby devised all his freehold and copyhold property in trust for his wife for life, with remainders over. And he thereby authorized his trustees to renew existing leases in consideration of a fine, which fine was to be held on the same trusts as the freehold and copyhold property. As to his personal estate, he bequeathed it to his wife absolutely.

The testator died on the 24th of *October*, 1864.

With respect to "*The Blue Coat Boy Tavern*," the following circumstances had occurred, which gave rise to the question in this cause. The testator had entered into negotiations with Mr. *Roseblade*, his tenant, for the renewal of the lease, and on the 17th of *October*, 1864, the testator's land agent (Mr. *Roberts*) wrote to Mr. *Roseblade* specifying the terms on which the testator would grant a new lease upon payment of a fine of 2,000*l*. He added, "I expect that you will send me an

After some negotiations, a landlord, by his agent, stated, in a letter to the tenant, the terms on which he would renew his lease, but added, he would expect an answer within a month. The landlord died seven days afterwards, and on the following day, the tenant and agent, both of whom were then ignorant of the death, met, and the tenant signed his acceptance of the terms: —*Held*, that there was no binding contract.

answer

1865.

 CARR
 v.
 LIVINGSTON.

answer within one month from the date, but Mr. *Livingston* will not be considered as having entered into any agreement until the fine be actually paid."

On the 25th of *October*, 1864, Mr. *Roseblade* called on Mr. *Roberts* and signed a formal agreement to accept the lease upon the terms proposed, and he paid him 200*l.* on account of the premium.

At this time the testator was dead, but neither Mr. *Roberts* nor Mr. *Roseblade* was aware of the fact. The agency of *Roberts* was not disputed.

Mr. *Roseblade* was desirous of accepting the proposed lease and all parties were willing that it should be granted to him on the terms mentioned in Mr. *Roberts*' letter of the 17th of *October*, 1864; but a question arose, whether the fine of 2,000*l.* would form part of the personal estate of the testator or ought to be held upon the trusts declared by the testator's will of the fines and premiums, and so be considered as real estate.

Mr. *John Pearson* for the Plaintiff, a trustee.

Mr. *Selwyn* and Mr. *Eddis*, for the widow, argued, first, that the tenant had the option of taking a renewed lease on the terms specified in the agent's letter, but to be exercised within one month. Secondly, that upon the exercise of the option, the fine of 2,000*l.* formed part of the testator's personal estate, and belonged to the widow; *Townley v. Bedwell* (a); *Weeding v. Weeding* (b).

They also referred to *Price v. Hathaway* (c).

Mr.

(a) 14 *Ves.* 590.

(b) 1 *John. & H.* 424.

(c) 6 *Madd.* 304.

Mr. *Hobhouse* and Mr. *Whitehorne*, for the other Defendants, were not heard.

1865.

 Carr
 v.
 Livingston.

The MASTER of the ROLLS.

I think there is no concluded agreement between the parties. If there had been, the tenant and the representatives of the testator might both have taken advantage of it; but this is a mere treaty. The landlord, by his agent, says to the tenant, I am willing to grant you a lease on certain terms, but before its acceptance the landlord dies.

The 2,000*l.* must be held on the same trusts as the fines held under the will.

GRIFFITHS *v.* BRACEWELL.
 BRACEWELL *v.* GRIFFITHS.

THE Plaintiffs, *William Bracewell*, *William Metcalfe Bracewell*, and the Defendant *Price Griffiths*, entered into partnership as ironfounders, upon the terms of articles dated in 1863.

Dec. 19, 20.

By partnership articles, one of three partners might "determine the copartnership by giving six calendar months' notice:" and in that case, immediately after the expiration of the six calendar months, the
 80 assets were to be valued, and

The 28th article was as follows:—

"That it shall be lawful for *William Bracewell*, of his own free will and without assigning any reason for so doing, to determine the copartnership by giving six calendar months' notice in writing of his intention

after the valuation being made and the result communicated, the partnership "shall, in regard to all the said partners, cease and determine:"—*Held*, that the partnership was dissolved at the expiration of the six months, and not from the completion of the valuation, though it continued after the six months, for the purpose of winding it up.

1865.

 GRIFFITHS
 v.
 BRACEWELL.

so to do, and leaving such notice at the respective usual dwelling-houses of the said *William Metcalfe Bracewell* and *Price Griffiths*, or at the counting-house of the partnership, and then and in that case immediately after the expiration of the said six calendar months, it shall be referred to *William Clarkson*," of &c., &c., "to value the partnership assets, plant, property and liabilities, and, for that purpose, all account-books, papers and documents shall be produced and submitted to the valuer so appointed; and upon the valuation aforesaid being made, and the result thereof communicated to each of the partners or his personal representatives, the co-partnership hereby intended to be established shall, in regard to all the said partners, absolutely cease and determine, without prejudice, nevertheless, to the remedies of the respective partners for any breach or non-performance, breaches or non-performances, before such the determination of the partnership, of any of the covenants or agreements contained in these presents."

Differences having arisen, the Plaintiff *William Bracewell* gave his co-partners a written notice on the 30th of *May*, 1864, that "it was his intention, at the expiration of the period of six calendar months from the day of the date thereof, to determine the partnership."

After this, *Griffiths* in *October*, 1864, filed his bill to reform the articles, by striking out the 28th article, and in other matters. It prayed for a dissolution, and for an injunction to restrain *William Bracewell* from acting on the notice of the 30th of *May*, 1864. His suit, however, failed.

The other suit was instituted by the two *Bracewells* against *Griffiths* in *July*, 1865, for a declaration that the partnership

partnership had been dissolved by the notice of *May*, 1864, and to have the affairs wound up on that footing.

1865.

GRIFFITHS
v.
BRACEWELL.

No valuation had as yet taken place.

Mr. Hobhouse and *Mr. Waller* for *Griffiths*.

Mr. Selwyn and *Mr. Speed*, for *Bracewell*, insisted, that upon the strict terms of the 28th article, the partnership did not "absolutely cease and determine" until "the valuation aforesaid" had been "made and the result thereof communicated to each of the partners."

Mr. Waller in reply.

The MASTER of the ROLLS.

In this case, on looking over the articles, my opinion is against *Mr. Griffiths*, and on two grounds. I think that the 28th clause of the partnership articles does not mean that there was to be no dissolution until the valuation had been made. I assent to the argument, that, in winding up partnerships there are two periods to be referred to, one when it is to be terminated by notice, and another period when, to use Lord *Elton's* expression in *Crawshay v. Maule* (a), if one partner has a right to consider the partnership at an end, it may continue for the purpose of winding up the affairs: that is, the partnership is going on for the limited purpose of winding it up.

Dec. 20.

The notice here was to determine the partnership at the end of six months; but it was still necessary that something more should take place. The business must necessarily

(a) 1 Swan. 507.

1865.
~
GRIFFITHS
v.
BRACEWELL.

necessarily go on in order to determine the rights of the several partners, and to realize the partnership property. There was a *quasi* and qualified partnership which continued for that purpose, and it went on until the assets had been realized and the shares of the partners had been ascertained. The 28th clause means simply this:—It assumes that the partnership determined at the end of the six months, but that it still went on for the purpose of ascertaining the rights of the partners, and that when those rights had been ascertained, the partnership absolutely ceased and determined.

I think, therefore, that Mr. *William Bracewell* is entitled to all the advantage to be derived from the notice which he gave.

Secondly, I am of opinion, that *Griffiths*, by his acts, has prevented the valuation being made, and that he cannot be allowed to take advantage of his own wrong.

I must therefore declare the partnership dissolved as from the 30th of *November*, 1864, and direct that the valuation be made by Mr. *Clarkson*, if he will undertake it, and that the usual partnership accounts be taken.

1865.

GRESHAM v. PRICE.

THIS case was argued by

Mr. *Hobhouse* and Mr. *C. Browne* on the one side,
and by

Mr. *Selwyn* and Mr. *Pearson* on the other.

Nov. 9.

Executors who
had neglected
to produce
their accounts
deprived of
their costs of
suit up to the
hearing.

The MASTER of the ROLLS.

Upon reading the evidence in this case, I think that the Defendant *James Gilbert Price* the younger has compelled the Plaintiffs to file this bill, by not producing his accounts, which he was bound to have ready. It is true that he nowhere absolutely refuses, but he postpones, delays and avoids, and nowhere promises to do it. Accordingly, the Plaintiffs having waited in vain from the 14th of *December* to the 7th of *July*, that is nearly seven months, filed the bill. I think they were justified in so doing, and that the Defendants were not justified in not sending accounts. The other Defendants are innocent, but they cannot be allowed to receive their costs of a suit which has been wantonly occasioned. They have not compelled *James Gilbert Price* the younger to make out the accounts as they ought to have done, and as they allowed him to manage the whole business they must take the consequences. I consider the conduct of *James Gilbert Price* the younger as equivalent to a refusal to account, although an exact denial is never mentioned, and so considering it, he cannot receive costs. It is clear that the distinction is verbal between a constant avoiding to produce
accounts

1865.

 GRESHAM
 v.
 PRICE.

accounts without denial and an open denial at once. The latter is more manly and straightforward and produces in the end less costs, as it avoids all the preliminary correspondence between solicitors.

My disposition is to deal leniently and lightly with trustees, and I am not disposed to make them pay costs, as that is a strong measure, and besides I think that the costs of this suit has been unnecessarily increased by some amendments.

The proper course is to direct the ordinary accounts to be taken, but the Defendants are to have no costs of this suit up to and including the hearing.

COX v. BOCKETT.

July 4, 5.

A case of forfeiture is *strictissimi juris*, and the party alleging it must prove it at the hearing, and no inquiry will, as in ordinary cases, be directed in regard to a forfeiture.

The Plaintiff's interest was subject to a condition of forfeiture by anticipating. He gave a power of attorney to receive the income and a charge to secure a debt. There being an arrear of income at the time, and it not being shewn that the debt exceeded the arrears:—*Held*, that there was no forfeiture.

THE testatrix died in 1858.

By her will, she gave one-fourth of the profits of a newspaper, called "The Builder," to trustees for the Plaintiff *John A. D. Cox*, for life, with remainders over, subject to the following contingency or condition:—

That if he should "be outlawed or declared bankrupt, or become an insolvent debtor within the meaning of any act of parliament for the relief of insolvent debtors, or should assign, charge or incumber, or attempt or affect to assign, charge or incumber, his share or proportion of profits or any part thereof, or should do or suffer



suffer anything whereby the same, or any part thereof, might, if belonging absolutely to him, become vested in or payable to some other person or persons, then and thenceforth the share or proportion of profits to which, but for this provision, he would be entitled, should during the remainder of his life or other interest therein, from time to time, sink into and be added to and form part of his general personal estate."

1865.

~~~~~  
Cox  
v.  
BOCKETT.

The trustees and some of the Defendants alleged that the Plaintiff had forfeited his interest, first, by executing to a creditor a power of attorney to receive the income; and secondly, by executing a charge to a Mr. *Keene* on the 20th of *November*, 1860, but which had been paid off in 1861.

There were some arrears of income due to the Plaintiff at the time he executed these two documents, the amount of which was doubtful, and it was not proved, by the Defendants, that the debts exceeded the arrears of income due at the time.

The trustees had discontinued to pay the income to the Plaintiff, on the ground of the alleged forfeiture, and this suit was instituted, in *May*, 1863, to obtain an account and for payment of the arrears.

Some of the Defendants still insisted on the forfeiture.

Mr. *Selwyn*, Mr. *Osborne* and Mr. *Locock Webb* for the Plaintiff *Cox*.

Mr. *Baggallay* and Mr. *Faber* for the trustees, and  
VOL. XXXV—1. E Mr.

1865.

Cox

v.

BOCKETT.

Mr. *Hobhouse* and Mr. *C. F. Bockett*, for other Defendants, contended that there had been a forfeiture.

Mr. *Beavan*, for another Defendant, took no part in this question.

*Acton v. Woodgate (a)*; *Browne v. Cavendish (b)*; *Wallwyn v. Coutts (c)*; *Wilding v. Richards (d)*, were cited.

---

*The MASTER of the ROLLS.*

July 5.

Upon reading the evidence, I am of opinion that the case of forfeiture is not made out, and I am also of opinion that a clause of forfeiture must be construed strictly.

There are two matters by which it is attempted to shew that a forfeiture has occurred. First, there is a power of attorney executed by the Plaintiff to receive his income. This may have been irrevocable, because it may have been given for value; but it is not proved that the amount due to the Plaintiff at the time, for his share of the business, was less than the debt, and I am of opinion, that if it can be shewn that the money to be paid under the power of attorney was less than what was then due to the Plaintiff, it was not an anticipation of the fund so as to bring it within this clause of forfeiture. But whether it was or not would depend on the result of an account.

With respect to the other case, that of Mr. *Keene*, the secondary

(a) 2 *Myl. & K* 492.

(b) 1 *Jones & Lat.* p. 635.

(c) 3 *Merr.* 707.

(d) 1 *Coll.* 655.

secondary evidence of the contract is very vague. The witness says that it was a charge of all the Plaintiff's interest, and that he considered it a charge of the future income, and that 170*l.* was the amount to be secured in *January*, 1861. I am disposed to think the Court would deal harshly, if it held that a forfeiture was occasioned by a charge made under a *bonâ fide* belief that the amount due for arrears to the Plaintiff exceeded the charge. I think the burthen of proof lies on those who insist on a forfeiture, and that it is not a case in which the Court will direct an inquiry, because no matter is so serious as a forfeiture, and a person who claims under it is put to strict proof, and cannot call on the Court to assist him in making out his case.

1865.  
Cox  
v.  
BOCKETT.

Except the question of forfeiture, there is nothing in the case, and in fact the keeping the Plaintiff out of his income was the very mode of making him incur a forfeiture.

I must declare that there has been no forfeiture.



1865.

WALKER v. THE WARE, &c., RAILWAY  
COMPANY.

Dec. 4.

The owners of land taken by public companies under their compulsory powers have the ordinary vendor's lien for unpaid purchase-money, and they are entitled to enforce that right by a sale of the land.

This lien extends not only to the value of the land, but also to the amount of compensation for damages.

This right of lien is unaffected by the deposit under the 85th section of the Lands Clauses Consolidation Act, and by a deposit, by agreement, before the amount payable has been ascertained.

The rights of the public, and of debenture creditors and others claiming under the company are subordinate to the vendor's lien for unpaid purchase-money.

IN 1861, this railway company, under their compulsory powers, took some land belonging to the Plaintiff, and under the 8 *Vict.* c. 18, s. 85, they deposited the sum of 700*l.* in this Court (being the *ex parte* valuation), and they gave the bond required by that statute.

The company required further lands belonging to the Plaintiff, and it was agreed that, in lieu of a payment into Court, the sum of 700*l.* should be deposited in a private bank in names agreed on, which was done.

The company took possession and constructed their railway over the lands taken. In 1863, the compensation was, by agreement, referred to arbitration, and by the award, made in *April*, 1864, 725*l.* was awarded for the lands taken, and 1,100*l.* as compensation "for the damages already sustained and thereafter to be sustained by reason of the severing of the lands sold," and from the other lands "being hereafter injuriously affected."

The title had been approved of, and the conveyance had also been approved of and had been "duly signed and executed" by the Plaintiff, "with a view to its delivery, but it had not yet been delivered by the Plaintiff, and was still in the Plaintiff's" possession.

The

The company having made default in completing the purchase, the Plaintiff brought an action at law, and in *December*, 1864, recovered judgment for 2,289*l.* and 45*l.* costs.

The Plaintiff issued an *elegit*, but was unable to obtain payment of his debt, and he, in *January*, 1865, instituted this suit, praying the payment of the judgment debt and costs, the payment of the deposits, a declaration that he, as unpaid vendor, had a lien on the lands for the purchase-money, and for an injunction to restrain the company retaining possession until payment, and for a receiver of the profits of the railway.

It appeared from the answer and the evidence that this company had, in *June*, 1863, under the powers of an act of parliament, entered into an agreement with the *Great Eastern Railway Company* for working the line for ten years. That company had been made Defendants by amendment. It also appeared that this company had borrowed on mortgage or debentures the sum of 29,400*l.*

After the institution of the suit, the Plaintiff received the money deposited (1,400*l.*) in part payment of his debt.

Mr. *Selwyn* and Mr. *Druce* for the Plaintiff. The vendor of these lands is entitled to the ordinary lien for his unpaid purchase-money, payment of which may be enforced by a sale or mortgage. The fact of the purchaser being a public company can make no difference in a vendor's rights.

Mr. *F. H. Colt* for the persons in whose name the money had been deposited.

Mr. *James Kaye* for the two Defendant companies. This is not the ordinary case of a vendor's lien for unpaid

1865.

WALKER

v.

THE  
WARE, &c.  
RAILWAY  
COMPANY.

1865.

WALKER  
v.  
THE  
WARE, &C.  
RAILWAY  
COMPANY.

unpaid purchase-money. The company took the land for public purposes under their parliamentary powers, and the bond and deposit, given under the Lands Clauses Consolidation Act, 1845 (8 *Vict.* c. 18, s. 85), were intended as a substitute for the lien, and formed the vendor's parliamentary security. The existence of such a lien as that claimed would be inconsistent with the nature of the transaction and the objects of the legislature. 2ndly. If any such lien ever existed, it has been waived by taking a security, *Nairn v. Prowse* (a), and has been discharged by the deposit and the payment made by the company, under an agreement between the vendor and the purchaser, and its subsequent receipt by the vendor. 3rdly. The deposit of 1,400*l.*, received by the Plaintiff, must be considered as appropriated to and taken in payment, in the first instance, of the purchase-money for the land, and not for the damages by reason of the severance. The land is therefore paid for, and there remains only damages for severance and injury to the estate; this is a separate and distinct matter, and is so treated by the arbitrator, who values them separately, and for which there can be no lien on the land; *Webb v. The Direct London and Portsmouth Railway Company* (b); *Doherty v. The Waterford, &c., Railway Company* (c).

But in cases of this description, involving the stopping of a public highway, the Court will have regard to the rights and interest of the public, *Wood v. The Charing Cross Railway Company* (d), and to the rights of the other unpaid vendors, and of the debenture holders, who are not represented in this suit.

The Plaintiff is entitled to no relief under his judgment,

(a) 6 *Ves.* 752.  
(b) 9 *Hare*, 139.

(c) 13 *Ir. Eq. Rep.* 538.  
(d) 33 *Beav.* 290.

ment, the suit was instituted before the expiration of a year (1 & 2 Vict. c. 110, s. 13). Again, the Plaintiff must exhaust his legal and special remedies before he can come for relief into equity; *Adams v. The Blackwall Railway Company* (a); and under his judgment he has no right to a sale or foreclosure; *Furness v. The Caterham Railway Company* (b).

1865.  
WALKER  
v.  
THE  
WARE, & C.  
RAILWAY  
COMPANY.

The legal estate has passed to the Defendants under the conveyance "duly signed and executed by the Plaintiff;" and the *Great Eastern Company* are purchasers for valuable consideration without notice of the Plaintiff's rights.

*The MASTER of the ROLLS.*

I do not assent to the view which has been presented to me very forcibly on behalf of the Defendants. I think the Plaintiff is entitled, in a great measure, to the decree which he asks. .

In the first place, I am of opinion that a distinction cannot properly be made between the price of land and the compensation for the injury done by the severance. If you take an acre of a man's land and give him 200*l.*, treating 100*l.* as the price of the land and the other 100*l.* as damage done to the estate by reason of the railway going through it, they are not to be separated, but are to be treated as the price of the land, and are not distinguishable. I think that is so, even where the amount is ascertained by arbitration, and the arbitrator awards specially the precise sums and items which make up the full sum which is so paid. I assent to this: that where compensation for damage alone is awarded, that

(a) 2 Mac. & G. 131.

(b) 25 Beav. 614, and 27 Beav. 358.

1865.  
WALKER  
v.  
THE  
WARREN, & C.  
RAILWAY  
COMPANY.

that is quite distinct from the price of the land. If it is compensation alone, and no land is taken, it can be no lien on the land, because there is no land upon which it can attach, and therefore payment of the amount can only be enforced, in the ordinary way, by action at law and judgment. I agree also that if two agreements are made, one in *January* to sell a piece of land, and afterwards a separate agreement is made as to the amount of compensation to be awarded for damage, which was not previously understood or appreciated, they must be treated as two separate and distinct agreements. But where the price to be paid for the land is made up of various ingredients, I am of opinion that the whole can only be treated as the price of the land, and that the vendor is entitled to the ordinary lien for the whole, as purchase-money not paid. If it were otherwise, it would be exceedingly difficult to ascertain the price, and it would lead to inextricable difficulties in ascertaining the various considerations which entered into the mind of the vendor or were discussed between them, and the various items which made up the price to be actually paid for the land. The price of the land may depend, not merely upon its productiveness, but also upon the use of it to the person who parts with it. You cannot separate that, and the whole sum paid must be treated as the price of the land. I am of opinion, therefore, that I cannot make a distinction between the portion awarded for compensation and the portion awarded as the price of the land.

In addition to this, I am of opinion that the acts of parliament have not deprived the vendor of his lien, and that according to the true construction of the act, it was never meant to give the railway company power to take possession of land upon an affidavit of a surveyor that he had valued it, and upon the amount being

being paid into a bank, to deprive the purchaser of his right to have the value of the land ascertained afterwards, and to have the ordinary lien of a vendor, in case the amount of purchase-money afterwards ascertained should not be paid. The amount of the lien here, is made up of two ingredients, one is the actual value of the land itself, and the other the damage from the severance and inconvenience done to the estate ; those two must be treated as combined and not as separated.

That being so, the next question is, whether the purchaser has deprived himself of his lien by taking security. The sums deposited in Court and in the private bank were not the agreed value of the lands, or what the vendor was willing to take for them. It is quite clear that the deposit could not be security for the purchase-money, for it had not been ascertained, and was not ascertained until the award had been made. The deposit of these sums beforehand, in order that so much of the purchase-money, at all events, should be secured to the purchaser when the amount of the purchase-money had been ascertained, cannot be considered analogous to or identical with the case of a purchase of property for a certain amount, where the vendor consents to take a security for that ascertained amount on other land or property, in which case he substitutes the lien or security taken for the lien which he has upon the land sold. I hold that the lien of a vendor for unpaid purchase-money is a right inherent in equity, which can only be taken away either by act of parliament or by express agreement. I also hold that it has not been taken away in this case either by the act of parliament or by any agreement, because, in point of fact, the amount was not ascertained.

The next question I have to consider is, what are the  
rights

1865.

WALKER  
v.  
THE  
WAKE, & C.  
RAILWAY  
COMPANY.

1865.  
~  
WALKER  
v.  
THE  
WARE, &c.  
RAILWAY  
COMPANY.

rights of the public. These rights no doubt are to be carefully considered, in all these cases, where the Court proposes, at the instance of somebody, to interfere with them. But the rights of the public with regard to property taken by a railway company can only be subject to the payment of the purchase-money. A railway company cannot take property from individuals without paying for it, and then say, that because it is for the benefit of the public that we should use this property, the vendor is therefore to be deprived of his land. In my opinion there is no authority to be found for any such doctrine, which is totally inconsistent with any notion of equity. The public can have no right to enable one person to deprive another of his property without paying for it.

With respect to the *Great Eastern Railway Company*, it appears to me that they were necessary parties, but there is nothing, in this case, to shew me that they have got the legal estate, or that they will get it, until the deed is actually delivered to the company. It is the ordinary and almost the invariable practice for the vendor to execute the conveyance and give it to his solicitor, who exchanges the deed for the purchase-money when paid by the purchaser. But it would be a monstrous thing for the purchaser to be allowed to say to the seller, "You have executed the deed, and therefore I need not pay the purchase-money; and I have got the legal estate, and you must enforce payment of the purchase-money as you can." On the contrary, I am of opinion the purchaser has no estate until he has the deed. This I take to be the ordinary case which occurs every day, where the deed of conveyance is executed as an escrow.

I am of opinion also that the interests of the debenture holders must all be subordinate to the interests  
of

of the vendor, and that the *Great Eastern Railway Company* can only take what the *Ware Railway Company* have to give, and they have nothing to give, except this land and property, subject to the lien of the vendor, which the vendor by this suit comes to enforce, and which he is entitled to do.

1865.  
WALKER  
v.  
THE  
WARE, &C.  
RAILWAY  
COMPANY.

I express no opinion as to whether the Plaintiff has any lien for the costs of the action at law; but what I propose to do is this: declare the Plaintiff's right to a lien, and refer it to Chambers to ascertain what is due for principal, interest and costs in respect of the lien; then I propose to fix a day for payment six months after the amount has been ascertained, and, in default of payment, to direct the land to be sold for the purpose of realising the amount. Any items in the account may be contested in Chambers.

#### WICKHAM v. THE MARQUESS OF BATH.

June 24.  
Nov. 4.

IN 1850, *Thomas Bunn*, a widower without issue, aged eighty-three years, resided at a freehold house belonging to him at *Frome Selwood* in *Somersetshire*. His sister *Jane Bunn*, who was also very advanced in years (eighty-one), also resided with him. His real estate in *Somersetshire* consisted of the house and the gardens, &c.

A man granted to his sister a lease of lands at a peppercorn rent for twenty years, determinable at their deaths. Three months afterwards he granted the hereditaments

to charitable uses, subject to the lease:—*Held*, that this gift to charity was an evasion of the Statute of Mortmain and void.

A testator directed his executors to apply 600*l.* in getting an act of parliament to continue an invalid disposition made by him of real estate to a charity:—*Held*, that this imposed no duty or obligation on the executors.

A grant of land to charitable uses was attested by one witness only, but two other persons who executed the deed were present:—*Held*, that this was not a sufficient compliance with the requirements of the Statute of Mortmain.



1865.  
  
 WICKHAM  
 v.  
 MARQUESS  
 OF BATH.

&c. appertaining thereto, in which he resided ; of another freehold house in *Cook Street, Frome Selwood*, of a farm, which was subject to a farming lease, and of some other property, of the annual value altogether of 429*l*.

By a lease dated the 1st of *May*, 1850, and made between *Thomas Bunn* of the first part, and *Jane Bunn* of the second part, it was witnessed, that, in consideration of natural love and affection and for the nominal consideration of 10*s.*, *Thomas Bunn* demised to *Jane Bunn* the two messuages and premises already described, with certain other hereditaments therein particularly described, and all the freehold messuages, lands, tenements and hereditaments of *Thomas Bunn* in the parishes of *Frome Selwood, Beckington, Berkley* and *Rodden* in the county of *Somerset*, with the appurtenances, for the term of twenty years from the date thereof, if *Thomas Bunn* and *Jane Bunn* or either of them should so long live, at the rent of a peppercorn if demanded. Such lease was executed by *Thomas Bunn* alone, and was never delivered to *Jane Bunn*, nor was any counterpart executed by her.

Afterwards, by an indenture dated the 26th of *July*, 1850, and made between *Thomas Bunn* of the first part, and the Marquess of *Bath* and twelve other trustees (including the Plaintiffs *Wickham* and *Cruttwell*) of the second part, after reciting that *Thomas Bunn* was desirous to improve the architecture, to widen the narrow roads and streets, and to amend the health and afford further means for the education of the inhabitants of the town of *Frome Selwood*, in which he had been born and where he then resided, and to promote the welfare of some other persons and places as far as his limited means permitted, *it was witnessed*, that for effecting the purposes aforesaid, and such others as were thereafter specified,

specified, and for the nominal consideration of 10s. therein mentioned to be paid to him by the parties of the second part, *Thomas Bunn* granted, conveyed and confirmed unto the parties thereto of the second part, and to their heirs and assigns, all the above two messuages in *Frome Selwood*, and all his other property in *Somerset* (subject to the farming lease and the lease to his sister of the 1st of *May*, 1850), and fifty-two-and-a-half acres (which in fact belonged exclusively to his sister, and over which he had no power whatever), upon certain charitable trusts, such as for supplying water, the erection of an ornamental fountain, the improvement of roads, providing play-grounds and books for schools, the formation of burial grounds, and other local improvements.

This indenture was duly signed, sealed and delivered by *Thomas Bunn* in the presence of two credible witnesses, and was enrolled in the Court of Chancery on the 1st of *August*, 1850 (being within six calendar months after the execution thereof), the same having been first duly acknowledged by *Thomas Bunn*.

After the execution of this deed, *Thomas Bunn* and his sister continued to live at the same house and to enjoy the property until the death of *Thomas Bunn*, on the 15th of *May*, 1853.

*Thomas Bunn* afterwards made his will, and referring to the deed of *July*, 1850, and that doubts had arisen as to its validity, he declared, that if any relation or person should attempt to defeat it, then he disinherited him; and he gave all his hereditaments as should not be faithfully applied according to the trusts of the deed to her Majesty Queen *Victoria* and Prince *Albert* and to their heirs for ever, without any restriction or trust whatsoever. And he proceeded: and if, after my death,  
 “ Her

1865.  
 WICKHAM  
 v.  
 MARQUESS  
 OF BATH.

1865.

WICKHAM

v.

MARQUESS  
OF BATH.

" Her gracious Majesty and His Royal Highness the Prince or the survivor of them shall not choose to trouble themselves, herself or himself with this affair, I give to my executors a sufficient sum of money, not exceeding 600*l.*, to enable them, with proper advice and friendly aid, to pass an act of parliament to confirm" the conveyance of the 26th of *July*, 1850, and the trusts therein contained if they require confirmation. And he gave any of his property that should remain to his sister Mrs. *Bunn*, her executors, administrators and assigns.

*Jane Bunn* was the heiress-at-law of the testator, and she and the Plaintiff Mrs. *Wickham* were his executors.

*Jane Bunn* afterwards executed a deed, dated the 16th of *September*, 1853, which was made between *Jane Bunn* of the first part, *Jane Bunn* and the Plaintiffs *Wickham* and *Cruttwell* of the second part, a trustee to uses of the third part, and the Plaintiffs and the surviving trustees of the deed of 26th *July*, 1850, of the fourth part. It recited the deed of *July*, 1850, and the will of the testator, and that *Jane Bunn* had been advised that the trusts thereby declared were absolutely void, and that the clauses contained in the will of *Thomas Bunn* relating thereto were inoperative, and that she was entitled absolutely to the hereditaments contained in the deed of *July*, 1850, as heiress-at-law of *Thomas Bunn*, or that she and the Plaintiffs were seised thereof in fee simple in trust for herself. It further recited that she was desirous to give effect to her brother's wishes, as expressed in the deed of the 26th of *July*, 1850. *The indenture then witnessed*, that, in order to give effect to that intention and for the nominal consideration of 10*s.*, she, *Jane Bunn*, and the Plaintiffs conveyed to *James Coller*, his heirs and assigns, all the messuages  
and

and hereditaments comprised in the deed of the 26th of *July*, 1850, to hold the same (subject and without prejudice to the indenture of lease of the 1st of *May*, 1850) to *James Collier* and his heirs, to the use of the parties thereto of the fourth part, their heirs and assigns, upon trust to receive the rents, and apply them on the trusts contained in the deed of the 26th of *July*, 1850, which were repeated.

1865.  
  
 WICKHAM  
 v.  
 MARQUESS  
 OF BATH.

The last-mentioned indenture purported, on the face of it, to have been signed, sealed and delivered by *Jane Bunn*, and by the Plaintiffs *Wickham* and *Cruttwell* respectively, in the presence of one witness only ; but it was, in fact, executed by *Jane Bunn*, not only in the presence of such witness, but also in the presence of the Plaintiff *Wickham*, before whom such deed was acknowledged by *Jane Bunn*, at the same time, for the purpose of enrolment, and in the presence of the Plaintiff *Cruttwell*, and such deed was, on the following day, namely, the 17th day of *September*, 1853, enrolled in the Court of Chancery.

*Jane Bunn* died on the 10th of *December*, 1862.

Prince *Albert* died in 1861, having devised his real estate to the Queen, who by a grant under her sign manual, dated the 21st of *July*, 1863, conveyed to the Plaintiffs and their heirs all the hereditaments devised to her and Prince *Albert*, to hold “(without prejudice to the trusts and purposes declared and contained by and in the indenture of the 26th of *July*, 1850, so far as, if at all, the same trusts and purposes were valid and subsisting, and without intending to ratify, confirm or set up such indenture, or the trusts and purposes thereof or any of them, so far as, if at all, the same were not valid or not subsisting) unto *Wickham* and *Cruttwell*,  
 their

1865.  
WICKHAM  
v.  
MARQUESS  
OF BATH.

their heirs and assigns, for all her estate, right and interest in or to the same, to be held by them upon and subject to such or the like trusts and equities as the said messuages; lands and hereditaments would have now been subject to under or by virtue of the will of *Thomas Bunn*, or by operation of law or otherwise, if she and her said Consort had, immediately after the death of *Thomas Bunn*, disclaimed the said devise or gift to her and her said Consort in the said will of *Thomas Bunn* contained."

Under these circumstances, various difficulties and questions had arisen as to the construction and effect of these documents. The trustees of the deeds of the 26th of *July*, 1850, and the 16th of *September*, 1853, alleged, that under one or other of such deeds the hereditaments had been effectually conveyed upon the trusts contained therein, and that if the first of such deeds was invalid, an application ought to be made for an act of parliament to obtain a confirmation of it. The other Defendants however alleged, that both of such deeds were void under the provisions of the statute 9 *Geo.* 2, c. 36, and that the indenture of the 16th of *September*, 1853, had not been signed, sealed and delivered in the presence of two credible witnesses within the meaning of such statute, and also that, notwithstanding the reference in the deed dated the 16th of *September*, 1853, to the lease of the 1st of *May*, 1850, as a then subsisting lease, *Jane Bunn* was then the absolute owner, and that she was well aware that she was then the absolute owner, of the hereditaments comprised in that indenture for an estate of inheritance in fee simple in possession. They also objected to any application to parliament.

The Plaintiffs instituted this suit to have the rights of the parties ascertained and declared.

The

The Statute of Mortmain (9 *Geo.* 2, c. 36) prohibits the gift of lands, &c. to charitable uses, unless such gift, &c., "be made by deed indented, sealed and delivered in the presence of two or more credible witnesses" twelve months before the death of the donor, and inrolled; "and unless the same be made to take effect in possession, for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause or agreement whatsoever, for the benefit of the donor or grantor, or any person claiming under him."

1865.  
  
 WICKHAM  
 v.  
 MARQUESS  
 OF BATH.


*Mr. Hobhouse* and *Mr. Rendall* for the Plaintiffs.

*Mr. Selwyn* and *Mr. Phear* for the trustees of the deed. The deeds of the 1st of *May*, 1850, and the 26th of *July*, 1850, were not contemporaneous; they were separate transactions, with an interval of nearly three months between them. The demise of the property to the sister for twenty years at a peppercorn rent was perfectly valid. The second deed passed all the interest of the grantor, and it "took effect in possession" and reserved no benefit to the grantor; this is all that the statute requires. Suppose the property had been let at rack-rent, its devotion to charity would have been perfectly valid; and equally so, if it had happened to be let at half the rack rent or less, or even at a peppercorn rent. It is sufficient that the whole interest of a grantor passes, even if that interest be merely reversionary. The possession does not affect the question; *Fisher v. Brierley* (a); *Alexander v. Brame* (b).

Secondly, the deed of the 15th of *September*, 1853, which

(a) 10 *H. of L. Cas.* 159, and  
 30 *Beav.* 265—268.

(b) 8 *H. of L. Cas.* 594, and  
 30 *Beav.* 153.

1865.  
  
 WICKHAM  
 v.  
 MARQUESS  
 OF BATH.

which was executed by *Jane Bunn*, is valid and operative. All that is required by the Statute of Mortmain is, that the deed should be "sealed and delivered in the presence of two or more credible witnesses." That has been done; and an attestation is not required; *Sugden on Powers* (a); *Sayle v. Freeland* (b).

Thirdly, as to the 600*l.*, there is nothing unlawful in the direction to apply to parliament.

Mr. *Baggallay* and Mr. *J. Pearson* for the heir-at-law. The two deeds of 1850 form one transaction, the object of which was, to give to charity that which the law does not permit, namely, a mere reversion after the death of the settlor. The whole was a shift and contrivance to evade the Statute of Mortmain, the intention of the first deed was to give validity to the second, which would otherwise have been inoperative, and by that means to retain possession of the property for life and settle the reversion only on the charity. The invalidity and the object are stated on the face of Mr. *Bunn's* will. The gift to the charity did not, in fact, "take effect in possession," but in reversion, which is the very thing the statute intended to prevent.

Secondly, there is no proper attestation to the deed of 1853; it is attested by one witness only. Though *Wickham* and *Cruttwell* were present, still they were present as parties to the deed and not as independent witnesses.

Thirdly, the 600*l.* cannot be applied in the way proposed, for the object of such an application is simply to  
 take

(a) *Page* 327 (6th edit.)

(b) 2 *Vent.* 355.

take away an estate from one person and vest it in another, and that at the expense of the former.

Mr. *T. Stevens* for the next of kin and residuary legatee.

1865.

WICKHAM  
v.  
MARQUESS  
OF BATH.

---

*The MASTER of the ROLLS.*

This is a suit instituted by the residuary devisees and legatees of the will of *Thomas Bunn* deceased, two of whom also are the surviving executors of his will, praying a declaration of the rights of the persons interested in the property of *Thomas Bunn* and also of his sister *Jane Bunn*, since deceased.

Nov. 4.

The principal Defendants are the trustees created by a deed executed by *Thomas Bunn* in his lifetime, conveying to them certain property at *Frome* in *Somersetshire*. The real question in the cause is, the validity or invalidity of this deed and of a subsequent deed executed by his sister *Jane Bunn* in confirmation of it. Their validity or invalidity depends upon whether they have been made in conformity with the provisions of the Statute of Mortmain; if not, the residuary devisees and legatees under *Jane Bunn's* will are entitled to the property, and the suit is instituted to try these questions. The deed executed by *Thomas Bunn* bears date the 26th July, 1850; he was the party to it of the first part, and the first nine Defendants on the record, the three Plaintiffs, and three other persons who have disclaimed the trusts or have since died, were the parties to it of the second part.—[His Honor stated the deed; see *ante*, p. 60.]

This deed was duly attested by two witnesses, it was



1865.

WALKER  
v.  
THE  
WARE, &C.  
RAILWAY  
COMPANY.

rights of the public. These rights no doubt are to be carefully considered, in all these cases, where the Court proposes, at the instance of somebody, to interfere with them. But the rights of the public with regard to property taken by a railway company can only be subject to the payment of the purchase-money. A railway company cannot take property from individuals without paying for it, and then say, that because it is for the benefit of the public that we should use this property, the vendor is therefore to be deprived of his land. In my opinion there is no authority to be found for any such doctrine, which is totally inconsistent with any notion of equity. The public can have no right to enable one person to deprive another of his property without paying for it.

With respect to the *Great Eastern Railway Company*, it appears to me that they were necessary parties, but there is nothing, in this case, to shew me that they have got the legal estate, or that they will get it, until the deed is actually delivered to the company. It is the ordinary and almost the invariable practice for the vendor to execute the conveyance and give it to his solicitor, who exchanges the deed for the purchase-money when paid by the purchaser. But it would be a monstrous thing for the purchaser to be allowed to say to the seller, "You have executed the deed, and therefore I need not pay the purchase-money; and I have got the legal estate, and you must enforce payment of the purchase-money as you can." On the contrary, I am of opinion the purchaser has no estate until he has the deed. This I take to be the ordinary case which occurs every day, where the deed of conveyance is executed as an escrow.

I am of opinion also that the interests of the debenture holders must all be subordinate to the interests  
of

of the vendor, and that the *Great Eastern Railway Company* can only take what the *Ware Railway Company* have to give, and they have nothing to give, except this land and property, subject to the lien of the vendor, which the vendor by this suit comes to enforce, and which he is entitled to do.

1865.  
WALKER  
v.  
THE  
WARE, &C.  
RAILWAY  
COMPANY.

I express no opinion as to whether the Plaintiff has any lien for the costs of the action at law ; but what I propose to do is this : declare the Plaintiff's right to a lien, and refer it to Chambers to ascertain what is due for principal, interest and costs in respect of the lien ; then I propose to fix a day for payment six months after the amount has been ascertained, and, in default of payment, to direct the land to be sold for the purpose of realising the amount. Any items in the account may be contested in Chambers.

#### WICKHAM v. THE MARQUESS OF BATH.

June 24.  
Nov. 4.

IN 1850, *Thomas Bunn*, a widower without issue, aged eighty-three years, resided at a freehold house belonging to him at *Frome Selwood* in *Somersetshire*. His sister *Jane Bunn*, who was also very advanced in years (eighty-one), also resided with him. His real estate in *Somersetshire* consisted of the house and the gardens, &c. A man granted to his sister a lease of lands at a peppercorn rent for twenty years, determinable at their deaths. Three months afterwards he granted the hereditaments to charitable uses, subject to the lease :—*Held*, that this gift to charity was an evasion of the Statute of Mortmain and void.

A testator directed his executors to apply 600*l.* in getting an act of parliament to continue an invalid disposition made by him of real estate to a charity :—*Held*, that this imposed no duty or obligation on the executors.

A grant of land to charitable uses was attested by one witness only, but two other persons who executed the deed were present :—*Held*, that this was not a sufficient compliance with the requirements of the Statute of Mortmain.

1865.  
WICKHAM  
v.  
MARQUESS  
OF BATH.

&c. appertaining thereto, in which he resided ; of another freehold house in *Cook Street, Frome Selwood*, of a farm, which was subject to a farming lease, and of some other property, of the annual value altogether of 429*l*.

By a lease dated the 1st of *May*, 1850, and made between *Thomas Bunn* of the first part, and *Jane Bunn* of the second part, it was witnessed, that, in consideration of natural love and affection and for the nominal consideration of 10*s.*, *Thomas Bunn* demised to *Jane Bunn* the two messuages and premises already described, with certain other hereditaments therein particularly described, and all the freehold messuages, lands, tenements and hereditaments of *Thomas Bunn* in the parishes of *Frome Selwood, Beckington, Berkley* and *Rodden* in the county of *Somerset*, with the appurtenances, for the term of twenty years from the date thereof, if *Thomas Bunn* and *Jane Bunn* or either of them should so long live, at the rent of a peppercorn if demanded. Such lease was executed by *Thomas Bunn* alone, and was never delivered to *Jane Bunn*, nor was any counterpart executed by her.

Afterwards, by an indenture dated the 26th of *July*, 1850, and made between *Thomas Bunn* of the first part, and the Marquess of *Bath* and twelve other trustees (including the Plaintiffs *Wickham* and *Cruttwell*) of the second part, after reciting that *Thomas Bunn* was desirous to improve the architecture, to widen the narrow roads and streets, and to amend the health and afford further means for the education of the inhabitants of the town of *Frome Selwood*, in which he had been born and where he then resided, and to promote the welfare of some other persons and places as far as his limited means permitted, *it was witnessed*, that for effecting the purposes aforesaid, and such others as were thereafter specified,

specified, and for the nominal consideration of 10*s.* therein mentioned to be paid to him by the parties of the second part, *Thomas Bunn* granted, conveyed and confirmed unto the parties thereto of the second part, and to their heirs and assigns, all the above two messuages in *Frome Selwood*, and all his other property in *Somerset* (subject to the farming lease and the lease to his sister of the 1st of *May*, 1850), and fifty-two-and-a-half acres (which in fact belonged exclusively to his sister, and over which he had no power whatever), upon certain charitable trusts, such as for supplying water, the erection of an ornamental fountain, the improvement of roads, providing play-grounds and books for schools, the formation of burial grounds, and other local improvements.

This indenture was duly signed, sealed and delivered by *Thomas Bunn* in the presence of two credible witnesses, and was enrolled in the Court of Chancery on the 1st of *August*, 1850 (being within six calendar months after the execution thereof), the same having been first duly acknowledged by *Thomas Bunn*.

After the execution of this deed, *Thomas Bunn* and his sister continued to live at the same house and to enjoy the property until the death of *Thomas Bunn*, on the 15th of *May*, 1853.

*Thomas Bunn* afterwards made his will, and referring to the deed of *July*, 1850, and that doubts had arisen as to its validity, he declared, that if any relation or person should attempt to defeat it, then he disinherited him; and he gave all his hereditaments as should not be faithfully applied according to the trusts of the deed to her Majesty Queen *Victoria* and Prince *Albert* and to their heirs for ever, without any restriction or trust whatsoever. And he proceeded: and if, after my death,  
 “ Her

1865.  
 WICKHAM  
 v.  
 MARQUESS  
 OF BATH.

1866.

WICKHAM  
v.MARQUESS  
OF BATH.

"Her gracious Majesty and His Royal Highness the Prince or the survivor of them shall not choose to trouble themselves, herself or himself with this affair, I give to my executors a sufficient sum of money, not exceeding 600*l.*, to enable them, with proper advice and friendly aid, to pass an act of parliament to confirm" the conveyance of the 26th of *July*, 1850, and the trusts therein contained if they require confirmation. And he gave any of his property that should remain to his sister *Mrs. Bunn*, her executors, administrators and assigns.

*Jane Bunn* was the heiress-at-law of the testator, and she and the Plaintiff *Mrs. Wickham* were his executors.

*Jane Bunn* afterwards executed a deed, dated the 16th of *September*, 1853, which was made between *Jane Bunn* of the first part, *Jane Bunn* and the Plaintiffs *Wickham* and *Cruttwell* of the second part, a trustee to uses of the third part, and the Plaintiffs and the surviving trustees of the deed of 26th *July*, 1850, of the fourth part. It recited the deed of *July*, 1850, and the will of the testator, and that *Jane Bunn* had been advised that the trusts thereby declared were absolutely void, and that the clauses contained in the will of *Thomas Bunn* relating thereto were inoperative, and that she was entitled absolutely to the hereditaments contained in the deed of *July*, 1850, as heiress-at-law of *Thomas Bunn*, or that she and the Plaintiffs were seised thereof in fee simple in trust for herself. It further recited that she was desirous to give effect to her brother's wishes, as expressed in the deed of the 26th of *July*, 1850. The instrument then witnessed, that, in order to give effect to that intention and for the nominal consideration of 10*s.*, she, *Jane Bunn*, and the Plaintiffs conveyed to *James Under*, his heirs and assigns, all the messuages  
and

and hereditaments comprised in the deed of the 26th of *July*, 1850, to hold the same (subject and without prejudice to the indenture of lease of the 1st of *May*, 1850) to *James Collier* and his heirs, to the use of the parties thereto of the fourth part, their heirs and assigns, upon trust to receive the rents, and apply them on the trusts contained in the deed of the 26th of *July*, 1850, which were repeated.

1865.  
  
 WICKHAM  
 v.  
 MARQUESS  
 OF BATH.

The last-mentioned indenture purported, on the face of it, to have been signed, sealed and delivered by *Jane Bunn*, and by the Plaintiffs *Wickham* and *Cruttwell* respectively, in the presence of one witness only; but it was, in fact, executed by *Jane Bunn*, not only in the presence of such witness, but also in the presence of the Plaintiff *Wickham*, before whom such deed was acknowledged by *Jane Bunn*, at the same time, for the purpose of enrolment, and in the presence of the Plaintiff *Cruttwell*, and such deed was, on the following day, namely, the 17th day of *September*, 1853, enrolled in the Court of Chancery.

*Jane Bunn* died on the 10th of *December*, 1862.

Prince *Albert* died in 1861, having devised his real estate to the Queen, who by a grant under her sign manual, dated the 21st of *July*, 1863, conveyed to the Plaintiffs and their heirs all the hereditaments devised to her and Prince *Albert*, to hold “(without prejudice to the trusts and purposes declared and contained by and in the indenture of the 26th of *July*, 1850, so far as, if at all, the same trusts and purposes were valid and subsisting, and without intending to ratify, confirm or set up such indenture, or the trusts and purposes thereof or any of them, so far as, if at all, the same were not valid or not subsisting) unto *Wickham* and *Cruttwell*,  
 their

1865.

WICKHAM  
v.  
MARQUESS  
OF BATH.

their heirs and assigns, for all her estate, right and interest in or to the same, to be held by them upon and subject to such or the like trusts and equities as the said messuages; lands and hereditaments would have now been subject to under or by virtue of the will of *Thomas Bunn*, or by operation of law or otherwise, if she and her said Consort had, immediately after the death of *Thomas Bunn*, disclaimed the said devise or gift to her and her said Consort in the said will of *Thomas Bunn* contained."

Under these circumstances, various difficulties and questions had arisen as to the construction and effect of these documents. The trustees of the deeds of the 26th of *July*, 1850, and the 16th of *September*, 1853, alleged, that under one or other of such deeds the hereditaments had been effectually conveyed upon the trusts contained therein, and that if the first of such deeds was invalid, an application ought to be made for an act of parliament to obtain a confirmation of it. The other Defendants however alleged, that both of such deeds were void under the provisions of the statute 9 *Geo.* 2, c. 36, and that the indenture of the 16th of *September*, 1853, had not been signed, sealed and delivered in the presence of two credible witnesses within the meaning of such statute, and also that, notwithstanding the reference in the deed dated the 16th of *September*, 1853, to the lease of the 1st of *May*, 1850, as a then subsisting lease, *Jane Bunn* was then the absolute owner, and that she was well aware that she was then the absolute owner, of the hereditaments comprised in that indenture for an estate of inheritance in fee simple in possession. They also objected to any application to parliament.

The Plaintiffs instituted this suit to have the rights of the parties ascertained and declared.

The

The Statute of Mortmain (9 *Geo.* 2, c. 36) prohibits the gift of lands, &c. to charitable uses, unless such gift, &c., "be made by deed indented, sealed and delivered in the presence of two or more credible witnesses" twelve months before the death of the donor, and inrolled; "and unless the same be made to take effect in possession, for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause or agreement whatsoever, for the benefit of the donor or grantor, or any person claiming under him."

1865.  
WICKHAM  
v.  
MARQUESS  
OF BATH.

Mr. *Hobhouse* and Mr. *Rendall* for the Plaintiffs.

Mr. *Selwyn* and Mr. *Phear* for the trustees of the deed. The deeds of the 1st of *May*, 1850, and the 26th of *July*, 1850, were not contemporaneous; they were separate transactions, with an interval of nearly three months between them. The demise of the property to the sister for twenty years at a peppercorn rent was perfectly valid. The second deed passed all the interest of the grantor, and it "took effect in possession" and reserved no benefit to the grantor; this is all that the statute requires. Suppose the property had been let at rack-rent, its devotion to charity would have been perfectly valid; and equally so, if it had happened to be let at half the rack rent or less, or even at a peppercorn rent. It is sufficient that the whole interest of a grantor passes, even if that interest be merely reversionary. The possession does not affect the question; *Fisher v. Brierley* (a); *Alexander v. Brame* (b).

Secondly, the deed of the 15th of *September*, 1853, which

(a) 10 *H. of L. Cas.* 159, and 30 *Beav.* 265—268. (b) 8 *H. of L. Cas.* 594, and 30 *Beav.* 153.



1865.  
  
 WICKHAM  
 v.  
 MARQUESS  
 OF BATH.

which was executed by *Jane Bunn*, is valid and operative. All that is required by the Statute of Mortmain is, that the deed should be "sealed and delivered in the presence of two or more credible witnesses." That has been done; and an attestation is not required; *Sugden on Powers* (a); *Sayle v. Freeland* (b).

Thirdly, as to the 600*l.*, there is nothing unlawful in the direction to apply to parliament.

Mr. *Baggallay* and Mr. *J. Pearson* for the heir-at-law. The two deeds of 1850 form one transaction, the object of which was, to give to charity that which the law does not permit, namely, a mere reversion after the death of the settlor. The whole was a shift and contrivance to evade the Statute of Mortmain, the intention of the first deed was to give validity to the second, which would otherwise have been inoperative, and by that means to retain possession of the property for life and settle the reversion only on the charity. The invalidity and the object are stated on the face of Mr. *Bunn's* will. The gift to the charity did not, in fact, "take effect in possession," but in reversion, which is the very thing the statute intended to prevent.

Secondly, there is no proper attestation to the deed of 1853; it is attested by one witness only. Though *Wickham* and *Cruttwell* were present, still they were present as parties to the deed and not as independent witnesses.

Thirdly, the 600*l.* cannot be applied in the way proposed, for the object of such an application is simply to  
 take

(a) *Page* 327 (6th edit.)

(b) 2 *Vent.* 355.

take away an estate from one person and vest it in another, and that at the expense of the former.

Mr. *T. Stevens* for the next of kin and residuary legatee.

1865.  
WICKHAM  
v.  
MARQUESS  
OF BATH.

---

*The MASTER of the ROLLS.*

This is a suit instituted by the residuary devisees and legatees of the will of *Thomas Bunn* deceased, two of whom also are the surviving executors of his will, praying a declaration of the rights of the persons interested in the property of *Thomas Bunn* and also of his sister *Jane Bunn*, since deceased.

Nov. 4.

The principal Defendants are the trustees created by a deed executed by *Thomas Bunn* in his lifetime, conveying to them certain property at *Frome* in *Somersetshire*. The real question in the cause is, the validity or invalidity of this deed and of a subsequent deed executed by his sister *Jane Bunn* in confirmation of it. Their validity or invalidity depends upon whether they have been made in conformity with the provisions of the Statute of Mortmain; if not, the residuary devisees and legatees under *Jane Bunn's* will are entitled to the property, and the suit is instituted to try these questions. The deed executed by *Thomas Bunn* bears date the 26th *July*, 1850; he was the party to it of the first part, and the first nine Defendants on the record, the three Plaintiffs, and three other persons who have disclaimed the trusts or have since died, were the parties to it of the second part.—[His Honor stated the deed; see *ante*, p. 60.]

This deed was duly attested by two witnesses, it was

F 2

enrolled

1865.  
  
 WICKHAM  
 v  
 MARQUESS  
 OF BATH.

enrolled in chancery within a month of its execution, and *Thomas Bunn* did not die till long after twelve months had elapsed from the date of its execution. The forms therefore of attestation, enrolment and survivorship of the grantor were fully complied with; but the validity of the deed depends upon whether, upon the true construction of the Statute of Mortmain, the lands vested in possession on the execution of the deeds; and, if not, whether it must not be considered to have been an evasion of the provisions of that act.

The lands and hereditaments which the deed purported to convey comprised all the real estate in which *Thomas Bunn* had any interest whatever. It included the house in which he lived, and also about fifty-two-and-a-half acres, which were the exclusive property of *Jane Bunn* his sister, and in which he had no interest, nor had he any power over them.

The lease of the 7th *October*, 1846, subject to which the hereditaments were conveyed, was a lease for seven years of 135 acres, of which about eighty-two-and-a-half acres were the sole property of *Jane Bunn*, and of which about fifty-two-and-a-half were included in the deed, and the lease was made by *Thomas Bunn* and his sister to *John* and *Daniel Joyce* at a rack rent of 190*l. per annum* on the usual terms of a farming lease.

The lease of the 1st *May*, 1850, was made by *Thomas Bunn*; by it he demised to his sister *Jane* the two messuages, two other hereditaments not comprised in the lease of 7th *October*, 1846, but included in the deed of 26th *July*, 1850, to hold to her for twenty years at a peppercorn rent, determinable on the death of the survivor of himself and his sister. At this time *Jane*, the younger of the two, was eighty years old.

They

They lived together till the death of *Thomas Bunn*, which took place in *May*, 1863.


Previous to that event, he had made his will, by which, after referring to this indenture of *July*, 1850, and stating that doubts were entertained as to its validity, he directs, &c.—[His Honor stated the will; see *ante*, p. 61.]

Before proceeding to consider the rest of the case, it will be convenient to dispose of that portion of it which depends upon this will. Her Majesty the Queen, in whom the whole interest in the devise I have stated has vested, has, by a grant under her sign manual on the 21st *July*, 1863, granted all the hereditaments to the Plaintiffs and their heirs, without thereby impeaching or affirming the trusts of the indenture of the 26th of *July*, 1850, but simply for the purpose of disclaiming all interest in the demise. The effect of this is exactly the same as if this devise had not been made by the testator.

The next direction in the will, to obtain an act of parliament to render the trusts of the indenture of *July*, 1850, valid, is also inoperative. Of course, there is no question but that parliament, if it pleases, might pass an act making these trusts valid, as they might pass an act to take away a field from one man and give it to another; but this direction contained in the will imposes no duty or obligation on the executors or trustees to apply for any such act, and as no such act has been obtained or applied for, and if it were, in all probability parliament would reject any bill introduced for this purpose, I must therefore proceed to consider the validity of the deed as it stands, unconfirmed by any extraordinary interposition of the legislature.

I think that the real question is, whether the lease of 1st *May*, 1850, being less than three months before

1865.  
  
 WICKHAM  
 v.  
 MARQUESS  
 OF BATH.

1865.  
  
 WICKHAM  
 v.  
 MARSHALL  
 of BATH.

before the execution of the deed of *July*, 1850, is not a colourable evasion of the statute of 9 *Geo.* 3, c. 36. The forms prescribed by that statute have been complied with, but the question is, whether the provisions of the statute, which enacts that the gift shall be void, unless it be made to take effect immediately, has been complied with in this case. I am of opinion that it has not, and that the deed, so far as it relates to the lands and hereditaments included in the lease of 1st *May*, 1850, is void. I hold it to be quite clear, that a conveyance of lands to be held in trust for the grantor during his life, and, upon his death, to be applied for the support of a particular charity would be void under the provisions of this act.

It would, I think, amount to the same thing and be subject to the same consequences, if this was done by two deeds and through the instrumentality of two sets of trustees. For instance, if the grantor, by the first deed, granted land to trustees in trust for himself for life, and subject thereto as he should by deed or will appoint, and by the second deed he appointed the reversion in fee irrevocably to other trustees, to hold for certain charitable uses: this, I apprehend, would be bad. It is true that where a reversion in real estate is vested in the grantor who has no present interest in the property, the irrevocable and immediate conveyance of it to trustees, in trust for charitable purposes, would probably be held to be valid; but not, I apprehend, if the reversion had been created by the grantor, for the purpose of allowing him to retain the enjoyment of the property during his life. In many of these cases it would be a question of fact to be deduced from the evidence laid before the Court; but assuming it to be established by the evidence, to the satisfaction of the Court, that the grantor had, at any time, divided the fee simple  
 into

into a life estate and a reversion, or had carved out of the fee simple such an interest as would outlast the life of the grantor, and that he had done this with a view of securing to himself the beneficial interest in the property during his life, and of disposing of it after his death for charitable purposes,—in such a case I am of opinion that the grant in favor of the charity would be an evasion of the provisions of the Statute of Mortmain, and, as such, would be held to be void by this Court. Were it not so, it is obvious that the real object of the statute would be easily evaded, and the words in it, to which I have referred, would be wholly inoperative.

If I am right in this, the question is, whether the lease of 1st *May*, 1850, falls within the principle I have endeavoured to enunciate, and I am of opinion that it does. Three months before the grant to the charity, the grantor, an old man of the age of eighty-three, without children, living with his only near relation, a sister of the age of eighty, makes a lease of the hereditaments in question to his sister for twenty years at a peppercorn rent, after which they continued to live together and enjoy the property until his death. It was reasonably certain that the lease would exceed his life, it was equally certain that the sister would not attempt to evict her brother during his life, and it is highly probable that had she attempted to do so, she would have failed. In truth, the concord between them to accomplish the wishes of the brother is established by the evidence. Here there is a lease, which provides for the enjoyment of these messuages and hereditaments during the life of the survivor of the brother and sister, and subject to their interest therein, it is given to trustees for charitable purposes. This, in my opinion, is not a case where, in the meaning of the words of the statute, it can be said with truth, that the grant is made

“ to

1865.

WICKHAM  
v.  
MARQUESS  
OF BATH.

1865.

WICKHAM  
v.  
MARQUESS  
OF BATH.

"to take effect in possession." "immediately" on the execution of the deed. That means, I apprehend, that the grantor shall give the whole interest he has in the thing granted. If the gift to the charity was intended to be an annuity or rent-charge, the grant must be of the whole interest in that annuity or rent-charge. If the thing granted be land, then the statute means that the whole interest the grantor has in the land should be conveyed, not the whole interest remaining in him at the exact date of the grant, after deducting his previous grants to secure benefits to himself, but the whole interest he had at the time when he first conceived and commenced the plan of benefitting the charity. If this be correct, then immediately another question arises, as to what is included in the words, the whole interest in the thing granted. I think that where lands are conveyed, this means the whole interest that a landlord usually possesses in his lands, which includes the rents receivable from the tenants. It is clear, that if *A.* agrees to sell to *B.* his estate at *W.*, this does not mean the reversion subject to existing leases, the payment for which in future is to be retained by the vendor. In the absence of any stipulation on the subject, it means, that the purchaser is to be put into possession of the estate at the date of the completion of the purchase, and that this possession includes the receipt of the future rents. In like manner, if a man grants land to a charity the statute requires that the grant shall "take effect in possession" "immediately," not leaving the grantor to receive the rents till the expiration of existing leases or during his life, but putting the grantee in immediate and entire possession of the thing granted, as far as the grantor is able to do so.

The way in which I regard this, will be made more plain by considering the bearing of this part of the question

question on the lease of the 7th of *October*, 1846, to the two *Joyces* of the remainder of the property included in the grant of *July*, 1850. This lease was clearly not granted to them with a view of afterwards making the grant to the Defendants of the 26th *July*, 1850. It was an ordinary farming lease, granted to tenants in the usual way, but this was excepted from the conveyance to the trustees, and the rent of 190*l.* to be paid by the *Joyces* was to be received and was received by the grantor as long as he lived. To make the grant valid, in my opinion, *Thomas Bunn* ought to have conveyed to the trustees all his interest as lessor of the property included in the lease of 1846. If not, this would only be another mode of evading the statute. A landlord makes a long lease of a farm at a rack rent payable to himself, a man advanced in years. He then grants the property, subject to the lease, to a charity. This is, in fact, only another mode of reserving to himself the full annual value of the land during the continuance of the lease. In what way can the case be really said to be varied, if the grant be to trustees, in trust to pay an annuity to the grantor for his life, and, subject thereto, for charitable purposes, or if the grant be to trustees, subject to a lease of similar annual value, which will, or probably may, exceed the life of the grantor. It is true that this lease had but three-and-a-quarter years to run, but the grantor was eighty-three years of age, and died in less than three years after the execution of the deed. How is the Court to speculate or act upon the probable duration of life of the grantor, or set this probability against the duration of a lease. The only safe rule seems to me to be, to hold that the grantor, in order to comply with the provisions of the statute, must grant all the interest he *bonâ fide* has in the property conveyed, whether from rents to be received or for actual possession at the time of the grant, and in addition to this, that he shall not, in

1865.  
  
 WICKHAM  
 v.  
 MARQUESS  
 OF BATH.



1865.  
  
 WICKHAM.  
  
 MARQUESS  
 OF BATH.

in contemplation of such grant for charity purposes, have deprived himself previously of any portion of this interest in favour of another, under any expressed or implied agreement that he is to derive any benefit from the portion so previously conveyed.

This grant of *July*, 1850, is defective in respect of the former of these propositions, by reason of it being made subject to the lease of *October*, 1846, and it is defective, also, in respect of the latter of these propositions, by reason of it being made subject to the lease of 1st *May*, 1850.

I am of opinion, therefore, that the deed of 26th *July*, 1850, is void, as being contrary to the provisions of the Statute of Mortmain, 9 *Geo.* 2, c. 36.

I have next to consider what effect the acts of the sister *Jane Bunn*, which have been done since the death of the brother, have had towards confirming the grant intended by the brother, and effecting the destination of this property, in the manner directed by him. In other words, whether the acts of *Jane Bunn*, the sister, since the decease of her brother, have either rendered valid the trusts of the deed of *July*, 1850, or have created new trusts to the same or similar effect.

*Jane Bunn*, besides being the sister of *Thomas Bunn*, was his heiress-at-law, his sole next of kin and the residuary devisee and legatee of all his property which could not be applied for the performance of the trusts of the charity pointed out by him.

Four months after her brother's death, *Jane Bunn* executed the indenture bearing date the 16th *September*, 1853, [see *ante*, p. 62]. This indenture appears, on the  
 face

face of it, to have been attested by one witness only, but two of the Plaintiffs, who executed the deed at the same time with *Jane Bunn*, were present at the time when she executed it, although they did not sign any attestation clause. At the same time, *Jane Bunn* acknowledged the deed before the same two Plaintiffs for the purpose of enrolment, which was accordingly done in Chancery on the following day, the 17th *September*, 1853.

1865.  
  
 WICKHAM  
 v.  
 MARQUESS  
 OF BATH.

The first question is, was this deed attested by two witnesses as required by the statute of 9 *Geo. 2*, c. 36? In all other respects the forms required by the act were complied with, the deed was duly enrolled, and *Jane Bunn* survived the twelve months required by the statute.

I am of opinion that this deed was not properly attested by two witnesses as required by the statute. What is meant by attesting a will or deed? It means, as I understand it, that one or more persons are present at the time of the execution of the deed for that purpose, and that, in evidence thereof, they sign the attestation clause stating such execution. The fact that any number of persons were present when *Jane Bunn* executed the deed would not comply with the provisions of the statute, if they did not sign the deed as witnesses attesting such execution. Were it otherwise, all the cases on powers, which require the strict performance of the condition attached to the exercise of the power would have been incorrectly decided. Nay, in truth, no attestation at all on the deed would be necessary, if any sufficient number of persons were present at the time and saw the deed executed, although their presence was without any object relating to the subject of the deed. In this case, however, it is supposed that a difference is to be found in the fact that the Plaintiffs *Whalley* and *Wickham*,

1866.  
  
 WICKHAM  
 v.  
 MARQUESS  
 OF BATH.

*Wickham*, who were present when *Jane Bunn* executed the deed, also executed it themselves; but, in my opinion, this makes no difference; they did not execute the deed *eo intuitu*, that is, they did not sign the deed for the purpose of attesting the execution of *Jane Bunn*, but for the purpose of conveying any interest they had or might be supposed to have had in the property. This cannot be converted into an attestation of *Jane Bunn's* execution.

In fact, were it otherwise, the cases decided as to the execution of powers would be all wrong, and the Statute of Mortmain might be easily evaded. Three tenants in fee simple of an estate might convey it to a charitable institution without any attestation at all, in the ordinary sense of the word; because, according to the argument of the Defendants (the trustees) if valid, any two of the grantors might be witnesses of the execution of the deed by the third, provided they all executed the deed at the same time and in each other's presence. The execution of this deed, therefore, in my opinion, has only been attested by one witness. If this opinion be correct, the omission of the attestation by a second witness is a plain violation of the provisions of the statute, and this deed also is, in my opinion, void.

It is further to be observed, that, notwithstanding this deed, *Jane Bunn* enjoyed the property as long as she lived, which was until the 10th *December*, 1862, when she died at the age of ninety-three. She had previously made a will making certain specific devises, and making four persons her residuary legatees, three of whom and the legal personal representatives of the fourth are parties Defendants to this bill. But by this will she did not dispose of the property included in either of the deeds of the 26th of *July*, 1850, or that of the 16th of *September*, 1853. I am, therefore, of opinion that the here-  
 ditaments

ditaments comprised in these deeds pass to the heir-at-law of *Jane Bunn*, and as the certificate of the Chief Clerk establishes that *Charles Kilson* the Defendant is such heir-at-law, he is entitled to a declaration accordingly in his favour.

1865.  
WICKHAM  
v.  
MARQUESS  
OF BATH.

The costs of all parties must be paid out of the property in dispute.

---

LORD LILFORD v. POWYS KECK. (No. 3.)

THE testator, Lord *Lilford*, devised all his real estates to the Plaintiff for life, with remainder to his first and other sons in tail, with remainders over (a).

He died in *March*, 1861.

Between the date of his will and his death, viz., in *November*, 1860, the testator purchased lands intermixed with the *Bank Hall* estate (b) for the sum of 72,600*l.* The purchase had not been completed at the death of the testator.

Dec. 18.  
Pecuniary legatees are entitled, as against the devisees (under the doctrine of marshalling assets), to stand in the place of an unpaid vendor whose lien has exhausted the personal assets.

The testator's personal estate not specifically bequeathed was insufficient to pay both his debts and the purchase-money for the estate. The pecuniary legatees thereupon insisted that they had a right to have the testator's assets marshalled, so as to have the benefit of the vendor's lien on the estate for their unpaid purchase-money, in case such lien should be discharged out of the personal estate.

Mr.

(a) *See* 30 *Beav.* 300.

(b) *Ib.* 295.

Mr. Robinson for the Plaintiff. *Lucas King* : 1st  
T & R T. 2 : 3) does not deny to anything but  
mortgages. There is no time to mention in this case.  
The opposite party is not bound. Just that since the  
Wills Act. T. 2 R. 2 & 3 a contrary view is not  
specific. That, however, has not been definitively de-  
termined, the decisions in the point being conflicting :  
*Sandy v. Haveridge* a : *Rotherham v. Rotherham* b ;  
*Eddels v. Simmons* c : *Pearson v. Tice* d : *Exes*  
*v. Smith* e : *Mirrehouse v. Scatch* f : and see *Barn-*  
*well v. Brown* g ; *Hood v. Hood* h.

Generally, the legatee says that they are entitled to the benefit of the vendor's lien. But the contrary was expressly decided by Sir John Leach in *Wythe v. Henricher* (1). He held that a person having devised an estate which he had purchased, and the vendor having after his decease been paid a part of the purchase-money which remained unpaid at the testator's death, out of the deceased's personal estate, the pecuniary legatee had no right to stand in the place of the vendor in respect of his lien upon the purchased estate, to the extent of the sum so received. There is a distinction between a vendor's lien and a mortgage on the estate. In the case of a mortgage, the testator has converted his realty into personalty, but in the case of a purchase of real estate he has done the opposite. *Birds v. Askey* (2) is inapplicable.

**He**

- (u) 1 *Dru. & Sm.* 236. (f) 2 *Myl. & Cr.* 695.  
(b) 26 *Beav.* 465. (g) 1 *Drew. & Sm.* 242.  
(c) 1 *Giff.* 22. (a) 26 *L. J., Chanc.* 616.  
(d) 2 *Giff.* 130. (i) 2 *Myl. & K.* 635.  
(e) 2 *De G. & Sm.* 722, 735. (k) 24 *Beav.* 618.

He also referred to *Jarman on Wills* (a); *Tombs v. Roch* (b).

1865.

~~~~~

LORD
DELFORD

v.

POWYS KECK.
(No. 3.)

Mr. *Whitbread* in the same interest.

Mr. *Selwyn* and Mr. *Cotton*, for the legatees, were not called on.

The MASTER of the ROLLS.

I am of opinion that there is no distinction between a mortgagee's and a vendor's lien. I considered it in *Bird v. Askey*, and my opinion remains unchanged. Declare that the legatees are entitled to the benefit of the vendor's lien to the extent to which he has exhausted the personal estate.

(a) *Vol. 2, ch. 46.*

(b) *2 Coll. 490.*

ROBINSON AND THE ALLIANCE BANK v.
THE CHARTERED BANK OF INDIA, &c.

THE bill stated to the following effect :—

Nov. 6, 9.

In 1864, Mr. *Robinson* deposited with the Plaintiff company seventy-five shares in the Defendant company, by way of security for money then advanced by the Plaintiff

By the deed of settlement of a company, shares might be transferred to any person approved by

the court of directors; but it provided that no person should be entitled to become a transferee unless and until he should be approved of by the court:—*Held*, that the power of rejection must be exercised reasonably, and that a refusal to make any transfer would not be a reasonable exercise of it.

A general demurrer to a bill filed by a shareholder against directors, who had a discretionary power of objecting to a transferee, to compel them to approve of a transfer to some proper person, overruled, the bill alleging, in substance, that they had refused to make any transfer at all.

1865.

 ROBINSON
 AND THE
 ALLIANCE
 BANK
 v.
 THE
 CHARTERED
 BANK OF
 INDIA, &C.

Plaintiff company. He at the same time executed a deed of transfer, but not in the form prescribed by the deed of settlement of the Defendant company.

The deed of settlement of the Defendant company provided the following formalities for the transfer of shares :—

“Transfer of Shares.

“Article 48. Subject to the provisions of these presents, any shareholder may sell and transfer all or any of his shares to any other person approved by the Court.”

“Article 49. No person, not being a lawful claimant of a share, shall be entitled to become a transferee of a share unless and until he be approved by the Court.”

In *July*, 1865, the Plaintiff company instructed their stock brokers (Messrs. *Whitehead*) to sell these shares, “and, in order to facilitate transfers to the purchasers, to take a transfer from Mr. *Robinson* to one of themselves, and they left at the Defendant’s office an application for one of its forms of transfers of the shares to Mr. *Jeffrey Whitehead*. The company refused to authorize the transfer to be prepared.

The solicitors of the Plaintiff company wrote the following letter to the secretary of the Defendant company :—

“We are instructed by the *Alliance Bank (limited)* to write to you on the subject of the refusal of your court of directors to permit a transfer of seventy-five shares in your company, which are at present standing in your books in the name of Mr. *G. P. Robinson*.” It then stated the deposit with the bank, and proceeded : Lately “they applied at your bank for a form of transfer of the shares referred to, and their broker was informed
 by

by you that the directors declined to allow any transfer of Mr. *Robinson's* shares. We now beg to inquire the reason of such refusal."

On the 8th of *September*, 1865, the solicitors of the Defendant, in answer (after stating the 48th and 49th rules), proceeded as follows:—"We have advised the directors that the last clause entitles them to withhold approval of any transferee, and consequently to refuse the transfer mentioned in your letter, and that they are entitled so to do without assigning any reason. The directors have decided to act on our opinion."

The bill then alleged as follows:—

"The Plaintiffs submit, that the court of directors of the Defendant company is bound to act on equitable principles in approving or disapproving proposed transferees of shares, so that no unnecessary or inequitable obstacles may be placed in the way of the disposal, by shareholders, of their shares; and they further submit, that any disapproval by the said court, under the said article 49, ought to be of a particular proposed transferee, and to be accompanied by such reasons as may enable the applicant to dispute the same, if insufficient, or, if sufficient, to propose another transferee, and that the said court cannot, under the said article, object to a transfer of any share by the actual holder thereof."

"The Plaintiffs aver and submit, that no just ground of objection existed to the said Mr. *Jeffrey Whitehead* as transferee of the said shares, and that by the refusal of the Defendant company, through its said court, to allow the said proposed transfer to the said Mr. *Jeffrey Whitehead*, or any other transfer of the said shares, they (that is, both the Plaintiff *George Palmer Robinson* and the Plaintiff company) have been and are wrongfully

VOL. XXXV—I.

G

damnified

1865.

ROBINSON
AND THE
ALLIANCE
BANK
v.
THE
CHARTERED
BANK OF
INDIA, &c.

1865.

ROBINSON
AND THE
ALLIANCE
BANK
v.
THE
CHARTERED
BANK OF
INDIA, &c.

damnified and hindered in the enjoyment of their respective legal and equitable rights and interests to and in the said shares."

The bill prayed that the Defendant company might be decreed to approve of some proper person, to be nominated by the Plaintiff company, as entitled to become a transferee of the shares, and issue proper forms and register such transfers, and for an injunction to restrain the refusing to allow any transfer to the Plaintiffs, or some proper nominee of the Plaintiffs.

To this bill the Defendant company filed a general demurrer.

Mr. *Selwyn*, Mr. *Baggallay* and Mr. *Bowring* in support of the demurrer. By the deed of settlement, which regulates the rights of the parties, the directors have an absolute discretion as to the persons to be admitted as shareholders. The law is, that a partnership cannot be changed except with the consent of all the partners, and that no new partner can be forced on the old firm. If it were otherwise, a person might be introduced from a rival concern, who would obtain access to all the secrets of the partnership. It depends on the character, solvency, temper, knowledge and interest of a person, whether he may or may not be a desirable person to introduce into a company, and the directors are not bound to express their reasons why they may not consider it advisable, having regard to the interests of the company, to admit a particular person into the concern. By contract, the shareholders have reposed in the court of directors an absolute right, for the interests of the company, to admit or reject. To oblige them to give reasons would invite discussions, and deprive the company of the protection intended by the articles of association.

association. Their decision is final, and their judgment is not to be controlled by the Court, unless they exercise it fraudulently. The mere assertion by the Plaintiffs that there are no just grounds for refusing to transfer is insufficient, in the face of the decision of the board of directors to the contrary. The refusal to admit a number of persons successively might be evidence of unfairness; but here the refusal is of a particular transfer, "the transfer mentioned in your letter," that is, a transfer to Mr. *Whitehead*, the broker of a rival bank. That of itself is a sufficient reason.

1865.

 ROBINSON
 AND THE
 ALLIANCE
 BANK
 v.
 THE
 CHARTERED
 BANK OF
 INDIA, &c.

This bill asks the Court to create a new partnership against the assent of the body of existing partners expressed by the directors.

The right of transfer is limited by the deed of association, it amounts to a right to transfer with the assent of all the other shareholders, which, for convenience, is to be given by the board of directors.

It is not a trust, but a matter of internal management, with which this Court never interferes, except in cases of fraud; *Foss v. Harbottle* (a); *Mozley v. Alston* (b); *Inderwick v. Snell* (c).

Mr. *Hobhouse* and Mr. *Westlake* in support of the bill. The court of directors have a discretion it is true, but it must be reasonably exercised, and when a Plaintiff alleges that it is not so, this Court must be the judge and determine the point upon the evidence at the hearing. Here, according to the allegations of the bill, the Defendants not only refuse to transfer to Mr. *Whitehead*,

(a) 2 *Hare*, 461.
 (b) 1 *Phillips*, 790.

(c) 2 *Mac. & G.* 216.

properly determined on this demurrer as the allegations now stand.

The two clauses which relate to this subject are the 48th and 49th. The 48th is this:—"Subject to the provisions of these presents, any shareholder may sell and transfer all or any of his shares to any other person approved by the Court."

1865.

 ROBINSON
 AND THE
 ALLIANCE
 BANK
 v.
 THE
 CHARTERED
 BANK OF
 INDIA, &c.

The next clause is, "No person, not being a lawful claimant of any share, shall be entitled to become a transferee of a share unless and until he be approved by the Court." I am not at all clear what is meant by "a lawful claimant" in this clause.

The question is, whether the Defendant bank can be compelled to approve of a person as transferee, who is, in all other respects, a fit person, except that he is a nominee of a rival bank. I think that, though this is, as I believe, the question to be tried, it is not clearly raised on this bill and demurrer. The letter of 7th of *September*, 1865, from the solicitors of the Plaintiff company says this:—"Lately, however, they applied at your bank for a form of transfer of the shares referred to, and their broker was informed by you, that the directors declined to allow any transfer of *Mr. Robinson's* shares. We now beg to inquire the reason of such refusal." That is an allegation that they would not allow the transfer of any of the shares at all. The answer to that is, giving a copy of the two clauses of the deed and settlement, and saying, "We have advised the directors that the last clause entitles them to withhold the approval of any transferee, and, consequently, to refuse the transfer mentioned in your letter, and they are entitled to do so without assigning any reason. The directors have decided to act on our opinion."

I think

1865.

ROBINSON
AND THE
ALLIANCE
BANK

v.
THE
CHARTERED
BANK OF
INDIA, &c.

I think that is a statement by the Defendant company that they will not allow any transfer at all, and not merely that they will not allow a transfer to a rival banking company.

The Plaintiffs also aver that there is no just ground of objection to the transferee Mr. *Whitehead*, and that by the refusal of the company, through its court, to allow the proposed transfer to *Whitehead*, or any other transfer, they are prevented from the enjoyment of their property. I entertain no doubt that the board of directors of the company must exercise the power given them by this proviso reasonably, and that to refuse to allow any transfer to be made to anybody would not be a reasonable exercise of their power. Whether it would be so with respect to the transferee of a rival bank, which would enable them to investigate its concerns or the like, I express no opinion. But thinking that the demurrer was *bonâ fide* filed for raising that question, I propose to overrule it and reserve the costs until the hearing.

If the question I have adverted to is really the question between the parties, I shall, in point of fact, merely reserve it until the hearing.

NOTE.—See *Berwingham v. Sheridan*, 33 *Beav.* 660; *Pinkett v. Wright*, 2 *Hare*, 120.

1865.

YOUNG v. SMITH.

Dec. 9.

IN 1835, upon the marriage of Mr. and Mrs. *St. John*, certain property was settled on the usual trusts.


The settlement recited, that it was also agreed, upon the treaty for the said intended marriage, that in case any property or effects, either real or personal, of the value of 500*l.* at one time, should at any time thereafter during the said intended coverture descend or devolve to *Helen St. John* or to *Oliver St. John* in her right, such property and effects should be settled upon the same or the like trusts as were therein expressed and declared concerning the said trust funds and premises so agreed to be thereby settled, as aforesaid.

The operative part of the deed, after settling the specified property, *further witnessed*, that in pursuance and further performance of the said agreement, *Oliver St. John* covenanted, that if, at any time or times during the said intended coverture, any real or personal property of the value of 500*l.*, at any one time, should descend or devolve to or vest in *Helen St. John* or to *Oliver St. John* in her right, then and in that case, and as often as the same should happen, he, *Oliver St. John*, his heirs, executors or administrators would make, do and execute, or cause and procure to be done and executed, all such deeds, assignments, conveyances and assurances in the law, whatsoever, which would be necessary and proper for conveying, assigning, assuring and confirming the said real and personal estate, in such manner as that

(regard

A marriage settlement recited an agreement that the after acquired property of the wife should be settled, but the covenant to settle was on the part of the husband only: — *Held*, that the wife was not bound by it.

Where they are inconsistent, the operative part of a deed prevails over the recitals; but where the operative part is ambiguous, the recitals may be resorted to to explain the ambiguity.

1865.

 YOUNG
 v.
 SMITH.

(regard being had for the nature and quality of the premises respectively) the said real and personal estate should be vested in the trustees or trustee for the time being of the settlement, upon and for the trusts, intents and purposes as would best and nearest correspond with the trusts, intents and purposes thereinbefore declared and contained of and concerning the trust monies and premises thereby settled.

Oliver St. John died on the 16th day of *November*, 1844.

In 1862, upon the death of her mother (the tenant for life) *Mrs. St. John* became entitled to a share in the residuary real and personal estate of her father (about 2,447*l.* stock), who had died in 1841.

The question was, whether this sum was bound by the covenant to settle contained in the deed of 1835.

Mr. Selwyn and *Mr. Herbert Smith* for *Mrs. St. John*, and *Mr. Jessel* for an incumbrancer. The fund in question is not subject to the trusts of the settlement. It is not an executory instrument, and the covenant is that of the husband alone, which in no respect binds the wife. If the recital and the operative part do not agree, the latter must prevail. The contract is that of the husband, and was merely intended to control his marital interest.

The case is governed by the authorities: *Peachey on Settlements* (a); *Ramsden v. Smith* (b); *Reid v. Kenrich* (c); *Grey v. Stuart* (d).

Mr.

(a) *Page* 523.
 (b) 2 *Drew.* 298.

(c) 1 *Jur. (N. S.)* 897.
 (d) 2 *Giff.* 398.

Mr. *Baggallay* and Mr. *Archibald Smith* for the trustees of the settlement. The first question is, whether this property, which remained reversionary until 1862, comes within the terms, "descend or devolve to or vest in" the Petitioner during the coverture.

1865.

 YOUNG
 v.
 SMITH.

[*The MASTER of the ROLLS*: I am disposed to think it does.]

Then comes the second question, whether, taking the recital and operative part together, they amount to a contract between the parties that this property should be settled, for if so, the Petitioner is bound to settle it. The law is, that whenever there is an apparent agreement between the parties that an act shall be done, though there be no express words of covenant, yet, if the parties set their seals thereto, it will amount to a covenant; *Hollis v. Carr* (a).—In that case, the deed contained a recital of an intention to levy a fine; there was no covenant to levy it, but only that the fine should be for the security of a portion. It was held, that this constituted a covenant to levy the fine. Here the agreement recited is positive, that "such property and effects shall be settled."

This case is like *Butcher v. Butcher* (b), where it was agreed between all parties, but the covenant was that of the husband alone, yet it was held binding on the wife. *Hammond v. Hammond* (c) is distinguishable, for there the husband's covenant was limited to acts "so far as he was concerned," and, therefore, did not extend to the wife. The wife, who has executed the settlement, is bound

(a) *Freeman* (C. C.) 3, and
 3 *Swanst.* 638.

(b) 14 *Beav.* 222.
 (c) 19 *Beav.* 29.

1865.

 YOUNG
 v.
 SMITH.

bound by it and estopped from setting up anything contrary to the agreement expressed in the deed.

The covenant on the part of the husband only is taken from the old forms used previous to *Purdew v. Jackson* (a), when it was supposed that a husband had the power of disposing of the reversionary interest of his wife.

The MASTER of the ROLLS.

I am of opinion, that the Petitioner is entitled to an order for the transfer to her of this fund.

It is important to keep the separate parts of a deed clear and distinct: the recitals and operative parts ought to be carefully distinguished: where they are at variance, the operative part is that which is officious, and the recital is ineffectual and produces no effect. A recital may explain an ambiguity in the operative part, but it cannot have the effect of introducing a covenant into it. A very dangerous result would follow if I held otherwise, for I should, by means of this recital, introduce into the body of this deed a covenant on the part of the lady to settle her after-acquired property.

The recitals in deeds are occasionally very loosely framed, but I adhere to what I said in *Hammond v. Hammond* (b), to the effect that where the operative part of a deed is at variance with the recital, the proper mode of dealing with the case is, to act on the operative part, unless and until the deed has been reformed. The recital may still be used as evidence in a suit for reforming the settlement.

The

(a) 1 *Russ.* 1.

(b) 19 *Beav.* 29.

The effect of this deed is simply this:—The recital states that it is agreed, that the wife's future property shall be settled, and the husband alone covenants to settle it. I do not know on what principle I can control the operative part of a deed by the recital, and extend it if I cannot restrict it. Here, in order to bind the Petitioner, I must strike out the covenant of the husband, and introduce one of the husband and wife.

1865.

YOUNG
v.
SMITH.

I am of opinion, that this would be unwarranted by any authority.

In *Butcher v. Butcher* (a), the agreement between the parties was contained in the operative part of the deed, and I was of opinion, that it was part of the operative part of the deed, and constituted a covenant by all parties. Here I find nothing in the operative part but the husband's covenant that he will settle. The useful office of a recital is to explain any ambiguity in the operative part, as in the case of *Moore v. Magrath* (b) in regard to the parcels. But it would be a very different thing to introduce a covenant by another person.

The case of *Hollis v. Carr* (c) is very distinct. There was a recital of an intention to levy a fine, and the covenants declared the uses of the fine to be to secure a sum of money on the property. The deed would have been inoperative without the fine, and when you agree to do an act, it implies a covenant to do all which is necessary to perfect it.

I am of opinion, the Petitioner is entitled to an order for the transfer to her of the fund.

(a) 14 *Bew.* 222.(b) *Comper*, 9.(c) 2 *Freem. (C. C.)* 3, and
3 *Swan*. 638.

1865.

*In re INSOLE.*

Dec. 9.

Husband and wife mortgaged the wife's reversionary interest in a fund. Afterwards, and before the reversion fell into possession, the wife obtained a decree for judicial separation. Upon the reversion afterwards falling in, in the husband's lifetime:—*Held*, that the mortgage did not affect it, and that the fund belonged absolutely to the wife.

MR. *INSOLE* died in 1831, having bequeathed one-sixth of his personal estate to *Thomas Insole* for life, with remainder to his children.

In 1850, *Eliza* (one of the six children of *Thomas Insole*) married *Alfred Puckle*, and in 1854, Mr. and Mrs. *Puckle* executed a mortgage to the *Consolidated Investment and Assurance Company* for 125*l.* and interest, and they afterwards executed a second mortgage to Mr. *Barker*.

In 1863, Mrs. *Puckle* obtained a decree for judicial separation from her husband.

In 1865, *Thomas Insole*, the tenant for life, died, and the trustees paid Mrs. *Puckle's* share (427*l.*) into Court.

This was a petition by Mrs. *Puckle* and of the persons to whom, in 1864, she had mortgaged her interest, praying payment to them of the fund according to their interests.

Mr. *Bagshawe* in support of the petition. The Petitioners are entitled to the fund discharged of the mortgages executed prior to the judicial separation and of all claim of Mr. *Puckle*. The mortgages which were executed by Mr. and Mrs. *Puckle* affected only the husband's interest, and in no respect bound Mrs. *Puckle*, and the interest of the husband determined by the decree of judicial separation. By the 20 & 21 *Vict.*

c. 85,

c 85, s. 25 (1857), Mrs. *Puckle*, from the date of the sentence and while it continues, is to be considered as a *feme sole* with respect to property which she may acquire or which may come to or devolve upon her. And by the 21 & 22 *Vict.* c. 108, property of or to which the wife was possessed or entitled for an estate in remainder or reversion, at the date of the decree of judicial separation, is included in the protection given by that decree.

1865.

~~~~~  
*In re*  
*INSOLE.*

Mr. *Schomberg* and Mr. *Speed* for the company and for Mr. *Barker*. The statutes of 1857 and 1858 cannot alter the antecedent rights under the mortgage of 1854. The mortgage by the husband and wife, no doubt, gave only a defeasible title, that is, the mortgagee took subject to the chance of the husband surviving the period of the reversion falling into possession. Subject to that condition and to the right to a settlement, the husband and his mortgagees took an absolute interest in the fund. Mrs. *Puckle* is entitled to a settlement of the fund, as in *Re Whittingham's Trust*, but that will give her a life interest only. The first act merely applies to property which might devolve on the wife after the decree, and the second, though extending to reversions, means subject to the existing charges and mortgages prior to the act. The mortgages of the wife alone cannot prevail against the prior ones of herself and husband.

*The MASTER of the ROLLS.*

I am of opinion, that the Petitioners are entitled to the order which they ask. In fact, the only effect of a mortgage of the reversionary interest of a married woman by the husband, though the wife joins in it, is, to mortgage the interest of the husband alone, and nothing more.

1865.

*In re*  
INSOLV.

more. A person who makes advances on such a security runs the risk that, at or before the time of payment arrives, the husband will have been able to acquire the charged property. The clause of the 20 & 21 *Vict.* c. 108, disposes of the right of the husband; for the moment the judicial separation takes place, the right of the husband is gone as if he were dead. The first act applies to "property of every description, which she may acquire, or which may come to or devolve upon her." The second act includes reversions to which the wife was entitled at the date of the decree, and this was a reversion which came to her after the separation. The husband mortgages a legacy which was payable to her after the death of her father; but if the husband had died previously to that period, the mortgage would have been worth nothing.

The first act says, that "property of every description" may be disposed of by her, in all respects, as a *feme sole*; she may sell, mortgage or squander it; then why am I to cut down the words and say she can only dispose of a life interest in it. The clause goes on to say, that on her decease it shall "go as if her husband had been then dead." Therefore, as soon as the judicial separation takes place, she may deal with her property in all respects as a *feme sole*; she may assign or leave it to whomsoever she pleases, and if she dies intestate, her husband is excluded, subject to what may happen in case she should return to live with her husband.

The Respondents are not entitled to costs out of the fund.

---

1865.

## MONTEFIORE v. BEHRENS.

ON the marriage of Mr. and Mrs. *Behrens* in 1843, a sum of 10,000*l.* Consols, which belonged to Mrs. *Behrens*, was settled on her for life, and after her death to pay the dividends to Mr. *Behrens* "until *Sampson Lucas Behrens* should, at any time, assign, transfer or in any manner part with the same dividends and annual produce, or any part or parts thereof, or should execute any assignment or other assurance, contract, act, matter or thing whatsoever, by means whereof the same should be aliened or incumbered, either at law or in equity, or until *Sampson Lucas Behrens* should assign, transfer, or in any manner part with the same, or any part or parts thereof, or should execute any assignment or other assurance, contract, act, matter or thing whatsoever, by means whereof the same should be aliened or incumbered, either at law or in equity, or until (if it should so happen) *Sampson Lucas Behrens* should be declared a bankrupt, or take the benefit of any act or acts of parliament for the relief of insolvent debtors, or the said dividends and annual produce or the beneficial interest, intended for *Sampson Lucas Behrens* under the trust thereafter contained of and in the said moiety of 10,600*l.* £3 per Cent. Consolidated Annuities, or any part thereof, respectively, should otherwise, by the act or default of *Sampson Lucas Behrens*, or by operation of law without his act or default, or by any other ways or means, become vested in or the property of any other person or persons whomsoever; and from and after the determination of the trust declared for the benefit of *Sampson Lucas Behrens*, on certain trusts for the children of the marriage.

Dec. 7.

A married woman became entitled to a legacy. Her husband settled it on her and her children, reserving to himself a life estate, determinable on his bankruptcy, &c. :—*Held*, that the limitation was valid.

Property was settled on *A. B.* until bankruptcy, &c. or until, by any act or default of *A. B.* or by any other ways, it should become vested in or the property of any other person. A creditor of *A. B.* obtained a judgment against him and a charge, under the 1 & 2 *Vict.* c. 110, s. 14, on the fund :—*Held*, that *A. B.*'s interest had thereby determined.

In

1865.  
MONTEFIORE  
v.  
BEHRENS.

In 1846, Mrs. *Behrens* became entitled to a legacy of 500*l.*, which was transferred by the executors to the trustees of the settlement, to be held on the same trusts as those expressed in the settlement of 1843, and a memorandum to that effect was endorsed on the settlement.

Mrs. *Behrens* died in 1854.

In *March*, 1858, Mr. *Hughes* obtained a charging order on the 500*l.* for 54*l.* 6*s.*; and in *April*, 1858, Messrs. *Camps* and *Partridge* obtained a charging order on the 500*l.* for 3*l.* 15*s.* 11*d.* debt, and 9*l.* 8*s.* costs.

In *March*, 1864, Mr. *Behrens* was duly declared an outlaw in the county of *Middlesex*.

This suit was instituted by the trustees for the performance of the trusts, and a question arose as to the forfeiture by Mr. *Behrens* of his interest in the settled property.

Mr. *Jessel* for the Plaintiffs.

Mr. *Renshaw* for the children.

Mr. *Freeman* for the Defendant *Hughes*. The 500*l.* belonged to the husband in right of his wife, and the wife, who was then sufficiently provided for by the prior settlement of the 10,000*l.*, had no equity to any further settlement. Practically, therefore, the 500*l.* belonged to Mr. *Behrens* himself, and the law does not allow a man to settle his own property in such a way as to go over on his bankruptcy, or in any other way so as to defeat the legal rights of his creditors.

The

The clause of forfeiture is therefore void ; *Higinbotham v. Holme* (a).

1865.  
  
 MONTEFIORE  
 v.  
 BEHRENS.

The charging order created no forfeiture ; it was no act of the debtor. The charge, under the 1 & 2 Vict. c. 110, s. 14, was not one created by the debtor himself, and it only gave to the creditor the same *remedies* as if the debtor had charged the 500*l.* There was no forfeiture, at all events, until the outlawry.

Mr. *Pemberton*, for *Camps* and *Partridge*, cited *Whitfield v. Prickett* (b).

*The MASTER of the ROLLS.*

I am against you on both points. This was the wife's property, and I think that she was entitled to have it settled if she and her husband thought fit that it should be, and that he could give up his marital claims without waiting to be compelled to do so. It is the same thing as if the settlement had been made by the Court, or as if the trustees had resisted payment of the legacy until a settlement of it had been made. According to the authorities, the wife herself might have filed a bill for that purpose, and this is certain :—that if a suit had been instituted, and the husband and wife had agreed on these as the terms of a settlement, the Court would have settled the legacy at once, and then all the trusts of this settlement would have been valid and binding.

The words are these : the income is to be paid to him until by his act or default or by operation of law it becomes the property of another person. He has done that by which (except for the proviso) it would become the property of the creditor.

It

(a) 19 Ves. 88.

(b) 13 Sim. 259.



1865.

MONTEFIORE  
v.  
BEHRENS.

It is impossible to say that a charging order is not a charge. If I were to decide otherwise, I must then hold that a charge is not a charge. It is true that a judgment creates a charge on lands, but not on stock, and that you must obtain a charging order upon the judgment for that purpose ; but that has been obtained, and it has become a charge on the property charged.

The result is, that the fund must be handed over to the children.

Nov 22.  
Dec. 6.

## DE HOGHTON v. MONEY.

The principle of this Court, established by a great number of cases, is, that it will not interfere between volunteers (in the legal sense of the term), but will leave them to their remedy at law, whatever that may be. The Court will neither, at the instance of the donor who

ALL the parties to the present suit were officers in a volunteer rifle regiment, whose head quarters were at *Hoxton*.

The Defendant, Mr. *Cotton*, kept a tavern at *Hoxton*, adjoining to which there was a piece of leasehold land used as a drilling-ground for the regiment. In 1861, Mr. *Cotton*, thinking it would be beneficial to him in increasing and improving his business, by establishing the rifle corps in that place, purchased this piece of land, which was held at a peppercorn rent, for 500*l*.

Some

repents his gift, cause the deed of gift to be delivered up, nor will it, at the instance of the donee, interfere to complete an imperfect deed of gift.

A purchaser for value of real estate cannot come into the Court of Chancery to have a prior voluntary deed, void under the 27th *Eliz.* c. 5, delivered up to be cancelled. The Court, in such a case, leaves both parties to their legal rights and remedies.

*A. B.* entered into a voluntary agreement as to a leasehold with *C. D.*, and he afterwards contracted to sell it to *E. F.* for valuable consideration :—*Held*, that a suit by *E. F.* against *A. B.* and *C. D.*, to have the rights of the parties declared and the voluntary agreement cancelled, could not be maintained.

Some negotiations afterwards took place between Mr. *Cotton* and Mr. *Money* (the lieutenant-colonel of the regiment) as to this land. On the 16th of *February*, 1862, Mr. *Money* wrote to the Plaintiff (the colonel of the regiment) pressing him to buy the land, and to let it at as small a rental as he could to the corps [see *post*, p. 103].

1865.  
  
 DE HOUGHTON  
 v.  
 MONEY.

To this the Plaintiff replied, that he was prepared to purchase for 530*l.* and sublet it to the regiment for seven years for 50*l.* a year [see *post*, p. 104].

On the 3rd of *March*, 1862, the Plaintiff sent Mr. *Money* a cheque for the purchase-money; it was, however, never paid over, but was returned to the Plaintiff some time afterwards. The purchase from *Cotton* was not completed, and some misunderstanding respecting the matter having taken place between *Cotton* and Mr. *Money*, *Cotton*, on the 11th of *March*, 1862, wrote to *Money* stating he was willing to give the regiment "the full and entire use" of the piece of ground for the remainder of the lease, if the regiment should so long exist, and that he would give 200*l.* for building. The regiment was to level the ground and pay 1*l.* per annum "as an acknowledgment that the ownership of the lease still remained with him."

Mr. *Money*, on receiving this letter, signed it and had it stamped as a lease, and paid the 1*l.* rent. Disagreements subsequently took place in consequence of Mr. *Money* having claimed the land.

On the 24th of *May*, 1864, *Cotton* agreed in writing to sell the land to the Plaintiff for 550*l.* without any reservation whatever (except as to a disputed right claimed by Mr. *Money* in respect of the letter addressed to him by Mr. *Cotton* dated the 11th of *March*, 1862).

1865.  
  
**DE HOUGHTON**  
 v.  
**MONEY.**

On the 10th of *June*, 1864, *Money* purported to assign the leasehold to the Defendant *Hook* (a captain in the regiment) and to himself in trust for the corps.

This suit was instituted on the 20th of *July*, 1864, by *De Houghton* against *Money*, and against *Cotton* and *Hook*, insisting that the letter of the 11th of *March*, 1862, had been obtained from *Cotton* by "surprise, concealment and improper influence," and was void.



The bill prayed a declaration of the rights of the parties; that the letter of the 11th of *March*, 1862, might be cancelled; that the conveyance to *Hook* might be declared void; for the specific performance of the agreement of the 24th of *May*, 1864, and that *Cotton* might execute a conveyance, and that *Money* and *Hook* might join in it.

Mr. *Baggallay*, Mr. *Jessel* and Mr. *W. D. Bruce*, for the Plaintiff, cited *Cooke v. Lamotte* (a).

Mr. *Southgate* and Mr. *Stock*, for *Cotton*, did not oppose, and referred to the 8 & 9 *Vict. c. 106*.

Mr. *Selwyn*, Mr. *C. T. Simpson* and Mr. *T. Salter*, for *Money* and *Hook*, referred to 26 & 27 *Vict. c. 65, s. 25*; *Tasker v. Small* (b).


Mr. *Jessel* in reply. *Wright v. Vernon* (c).

*The*

(a) 15 *Beav.* 240.  
 (b) 3 *Myl. & Cr.* 63.

(c) 7 *H. of L. Cas.* 35.

*The MASTER of the ROLLS.*

1865.  
  
 DE HOUGHTON  
 v.  
 MONEY.  
 Dec. 6.

This is a suit for the specific performance of a contract entered into between the Plaintiff and Defendant Mr. *Cotton* on the 24th *May*, 1864, for the assignment of a piece of land held by him on leasehold tenure, and also for the delivering up and cancellation of a letter of the 11th of *March*, 1862, written by the Defendant Mr. *Cotton* and sent to the Defendant Mr. *Money*.

The specific performance is a matter of course, no one resists it. The question is, what is to be done with the letter? The prayer of the bill, for this purpose, is novel in form, but one which the pleader evidently was compelled to adopt from the circumstances of the case. It is as follows:—

That the rights of the parties may be declared, and that it may be declared that the letter of the 11th of *March*, 1862, conveyed no estate or interest to *Money*, and was intended to operate as a revocable licence; that the indenture of the 10th of *June*, 1864, may be declared void and cancelled; that the agreement of the 24th of *May*, 1864, may be specifically performed, and that *Money* and *Hook* may join in the assignment, and for an injunction against *Money* and *Hook* to prevent them interfering with the ground.

The facts of the case are as follows:—The Plaintiff was the colonel of the 6th *Tower Hamlets Rifle Volunteers*, the Defendant Mr. *Money* is the lieutenant-colonel of that corps, and therefore commands it, and in whom all of the property of the corps vests. The other Defendant, Mr. *Cotton*, is also an officer in that corps, and was, at the time when the transaction occurred, the owner of the *Royal Standard Tavern*, where he seems to have carried on a thriving business

as

1865.  
  
 DE HOUGHTON  
 &  
 MONEY.

as a victualler, in the immediate neighbourhood of the place where the *6th Tower Hamlets Rifle Volunteers* carried on their drills and parades and where their headquarters were established. Adjoining to the regimental drill hall, was a triangular piece of ground of a little under half an acre in size, which might be made extremely commodious for the drilling of the corps and for the erection of a mess room and a library. In 1861, Mr. *Cotton* bought the residue of the term in this plot of land for 500*l*. ; the residue of the term was thirty-five years from 22nd *June*, 1862, and the rent was a peppercorn. The conveyance was made to him in 1862. I think that the fair result of the evidence is, that Mr. *Cotton* bought this piece of land, thinking that it would be beneficial to him in increasing and improving the business he carried on, by drawing to or establishing the rifle corps in that place. On the 1st of *August*, 1861, Mr. *Cotton* wrote a letter to Mr. *Money*, which was as follows:—

“ *Royal Standard, City Road,*

“ Sir,

“ *August 1st, 1861.*

“ I have much pleasure, in accordance with my promise, in forwarding you ten guineas, and, at the same time, allow me to express a wish that your company may continue to prosper as it has done since you took the command. The splendid manner in which you have taken possession of this building is most commendable, and places the corps in a position to carry out their military arrangements second to none in the metropolis, and only second to the *South Middlesex* in the suburbs. If I might be allowed the liberty, I should most respectfully suggest, that a reading-room would be a valuable and highly appreciated addition to the conveniences you have already secured. I am not aware that your premises will admit of such a thing; if not, I am prepared to build you one with an entrance end

d

distinct from my premises. Hoping that this proposition may be received by you favorably, and that the inclosed donation will be sufficient to make me an honorary member of your corps,

1865.  
 ~~~~~  
 DE HOGHTON
 v.
 MONEY.

"I have the honor to be, Sir,

"Yours most respectfully,

"George Cotton."

But there is nothing in it to shew that this was to be gratuitous.

After this, some negotiation took place between Mr. Cotton and Mr. Money, and on the 16th February, 1862, Mr. Money, writing to the Plaintiff, gives the following account of this, and makes a proposal which was accepted with a little qualification. Mr. Money's letter is as follows:—

"10th February, 1862.

"Last night Mr. Cotton's solicitor said 'let any man take the purchase off his hands.' The ground is well worth the money, and any one may have it at the cost price to Mr. Cotton. I have no doubt you would find it a fair investment; it is a large piece of land in the centre of a thickly populated neighbourhood with all Mr. Sturt's property round, and it must increase in value, as that property has so immeasurably increased. It has thirty odd years to run, at a most trifling ground rent, and the price is something under 550*l*. Your money would be perfectly safe, and if you would build the room upon it, and (if you like it) lease the whole to us at as small a rental as you could, you would really be conferring a great boon on the corps and one most calculated to make us hold our heads above water. You know that I have it not in my power to do such a thing myself or I would not ask you.

"Ever most truly yours,

"G. H. Money."

The

CASES IN CHANCERY.

1865.

The Plaintiff's answer to Mr. *Money* is as follows:—

HOGHTON
v.
MONEY.

" 22nd February, 1862.

" My dear *Money*,

" Under the circumstances stated in your note of the 16th instant (assuming there are no objectionable covenants and the ground rent to be nominal), I am prepared to purchase Mr. *Cotton's* lease of thirty-two years at the price paid by him, say 530*l.* This effected, I am further prepared to sublease it to yourself and others, on behalf of the regiment, for seven years, at 50*l. per annum.* As I should subscribe 50*l.* annually, so long as I remain connected with the corps, the rent during such time would amount to *nil.* The conveyance to me must be free of cost, and the regiment will be at liberty to erect such buildings on the land as they consider requisite.

" Yours very truly,

" *Henry Hoghton.*"

This went on for some time, and an appointment was actually made to complete the transaction and pay the price (a cheque for which had been sent by the Plaintiff on the 3rd of *March*, 1862), when the whole was stopped by a letter written by Mr. *Cotton* to Mr. *Money*, which is as follows:—

" *March* 11th, 1862.

" My dear Colonel,

" I much regret the apparent little misunderstanding that has occurred between you and myself respecting the purchase of the ground adjoining the new drill hall. It is perhaps now hardly worth while to go into explanations, which I can better give verbally when we meet. However, I wish you and the officers of the *6th Tower Hamlets Rifles* to clearly understand, that it was always my intention and wish that the regiment should enjoy the use of that piece of ground at my ex-
pen-

pense and for the period of my lease, if the regiment should exist so long, and that I would build, for the use of the regiment, a mess room. Of course it was not my intention to part with the lease itself, and in case the regiment should cease to exist before the termination of my lease, or in case the regiment should not require the ground, then, and in either of these cases, it would return to me as the owner of the lease. Now, to terminate all misunderstandings upon the point, permit me to say, that I am now willing to give our regiment (the 6th *Tower Hamlets*), for the whole term of my lease, the full and entire use of that piece or parcel of ground situate near the new drill hall, *Hoxton*, formerly a theatre, and of which I have purchased the remainder of the lease from Mr. *Thorne*, if the regiment should exist so long and if the regiment should require it for that period, upon this understanding:—that the regiment, from its own funds or otherwise, will level or cause to be filled up the said piece of ground, and will so prepare the same as to fit it for a proper drill ground, for which purposes only it is to be used. I will also give to the regimental funds the sum of 200*l.*, to be used for the purpose of building an armory and mess room, with other accommodations for the use of the said regiment, and for regimental purposes only. The building may be placed upon the said piece of ground in any position you, as colonel of the regiment, may select, with this further understanding:—that all the covenants of my lease are to be binding upon and fulfilled by the regiment, and that the ground and mess room shall be kept in a proper state of repair, and that the regiment shall pay or cause to be paid to me, or to my executors or administrators, the sum of 1*l.* sterling *per annum*, so long as they continue to hold and enjoy the use of the said piece of ground and mess room, as an acknowledgment that the ownership of the lease remains still with me, or with my
executors

1865.

DE HOUGHTON
v.
MONEY.

1865. *De Houghton*
 v.
Money. executors or administrators for the time being. And, upon your paying to me 1*l.* in advance, you may consider that this letter at once gives you the full right and legal title to use the aforesaid piece of ground as effectually, and to all intents and purposes, as though a regular lease had been executed between us.

"I am, dear Colonel,

"Yours very truly,

"*G. Cotton.*"

It certainly does seem very singular that when the terms of the sale of the land had been settled, the deed prepared accordingly, the money sent for the payment of the price and a day fixed on for the completion of it, Mr. *Cotton*, who had hitherto insisted on receiving this price, should suddenly determine to give the whole piece of land gratuitously to the regiment. I call it gratuitously, because, in my opinion, the sum of 1*l.* a year cannot be considered as a consideration for the sale of the property, nor indeed is it so treated in the letter itself; but it is referred to simply as a nominal acknowledgment of ownership in Mr. *Cotton*, in the event of the corps being disbanded. The circumstances under which the letter was written and signed are described by Mr. *Grissell*, a captain in the regiment, and by Mr. *Cotton* himself—[His Honor read it; but it shewed, in the opinion of the Court, that no fraud, pressure, misrepresentation or undue influence had been practised on Mr. *Cotton*.]—As soon as Mr. *Money* received the letter, he made the most he could of it; he signed it himself as if it had been a mutual agreement, he caused his signature to be attested, he then caused the document to be stamped as a lease, and subsequently, when this bill was threatened, he caused to be prepared and executed an indenture of the 10th of *June*, 1864, whereby he purported to convey the leasehold property to the Defendant Mr.

Hook,

Hook, a captain in the regiment, and to himself in trust for the corps.

1865.

DR HOOKTON
v.
MONEY.

On the 24th of *May*, 1864, and apparently with the object of getting rid of the effect of this letter of the 11th of *March*, 1862, or any effect that it might be supposed to have, an agreement was entered into between the Plaintiff and the Defendant Mr. *Cotton* for selling the land to the Plaintiff, subject to the right claimed by Mr. *Money*, and this bill was filed on the 20th of *July*, 1864.

The question, in this state of circumstances, is, what is the character and effect of this letter of the 11th of *March*, 1862, and whether it is of such a description, that this Court can order it to be delivered up to be cancelled.

In the first place, I am of opinion, that this document was not obtained by fraud, misrepresentation or undue influence. I am of opinion, on the evidence both of Mr. *Cotton* and Mr. *Grissell*, which I have read, that Mr. *Cotton* fully understood the value of the property, and what he was offering to give up, and though the letter was obtained somewhat hastily, no pressure or improper influence was exercised for that purpose. It was, in my opinion, purely voluntary, and my belief is, that Mr. *Cotton* expected to derive advantages from his act of generosity which have not been realized; but whether this surmise of mine be or be not correct, it cannot, in my opinion, affect the question I have to decide.

The question is, can I declare this document to be void or order it to be delivered up to be cancelled? I will first examine it, as if it had been a deed under seal,
and

1865.

 DE HOGHTON
 v.
 MONEY.

and consider how I could have dealt with it, if an application had been made by Mr. *Cotton* to have it delivered up and cancelled before the contract of the 24th of *May*, 1864, was entered into between Mr. *Cotton* and the Plaintiff. I will next consider how the matter is affected by the subsequent contract of the 24th of *March*, 1864, between the Plaintiff and Mr. *Cotton*; and, finally, I will consider how the case is varied by the fact that the document in question is not a deed, but simply an instrument signed by Mr. *Cotton*.

The principle of this Court, established in a great number of cases, is, that it will not interfere between volunteers, in the legal sense of the term, but will leave them to their remedy at law, whatever that may be. The Court will neither, at the instance of the donor, who repents his gift, cause the deed of gift to be delivered up, nor will it, at the instance of the donee, interfere to complete an imperfect deed of gift. This subject is very fully discussed by Sir *James Wigram* in the case of *Meek v. Kettlewell* (a), and is laid down in so many cases that it is unnecessary to refer to them; I have had the case repeatedly before me, and the decisions on the subject are familiar to every practitioner in the Court. If, therefore, this had been a deed and Mr. *Cotton* had required it to be delivered up to be cancelled, the Court could not properly have interfered.

I have next to consider, whether the contract entered into with the Plaintiff by Mr. *Cotton* in any respect alters the case, and in my opinion it does not. It is true that the statute of the 27th *Eliz.* c. 5, makes a voluntary conveyance of land void, as against a purchaser for value; but although this is the case, even where the purchaser had notice of the voluntary deed,
 it

(a) 1 *Hare*, 464.

it has never been held that a purchaser for value could come into this Court to have the voluntary deed delivered up to be cancelled. It leaves both parties, in such a case, to their legal rights and remedies.

1865.

 DE HOUGHTON
 v.
 MONEY.

Lastly, can the circumstance that this document is not under seal alter the principles of equity as applicable to this case. I am of opinion that it cannot. Those principles do not depend on the nature of the instrument, but upon this:—that as between donor and donee, where everything is straightforward on both sides, this Court will not assist either party, that it is not a matter of equity or good conscience, that a repenting donor should be allowed to recall his gift, or that he should be compelled to complete the gift he had promised to make.

The document, in this case, is a mere informal instrument, which has but little efficacy at law. If Colonel *Money* had instituted a suit to have a regular assignment of the lease, it is difficult to see how that suit could have been supported. It makes no difference, in this matter, that Colonel *Money* claims no *bonâ fide* personal interest in the land, and only claims it as a trustee for the regiment. If Mr. *Cotton* had filed a bill to have it delivered up and cancelled, it is equally difficult to understand on what equitable ground such a suit could have been supported. But this bill seems to have been framed on the supposition, that the contract between Mr. *Cotton* and the Plaintiff gave the Plaintiff a right to a relief in equity, which Mr. *Cotton* himself could not have enforced. In my opinion this is erroneous, and although the sale for value in some cases may, by virtue of the statute of the 27th *Eliz.* c. 5, give the purchaser an advantage at law which the donor could not have obtained directly, it does not, in equity,
 have

1865.
 DE HOUGHTON
 v.
 MONEY.

have any such effect, but the purchaser can only do what the vendor himself could have done.

In truth, I was somewhat at a loss to understand, during the argument, the reasons which have induced the Plaintiff to file this bill. The document in question of the 11th of *March*, 1862, conveys no legal estate, and, if it did, then, upon the conveyance by Mr. *Cotton* to the Plaintiff, he might have brought his ejectment. If the document has any legal operation at all, it appears to me to be confined to giving Colonel *Money* a tenancy from year to year, which might have been determined by a proper notice to quit, and if Colonel *Money* had then come to this Court for assistance, he would have been met by that series of cases to which I have already referred, of which *Meek v. Kettlewell* (a), before Vice-Chancellor *Wigram*, and which I have already mentioned, is an instance.

It is true that, throughout the observations I have hitherto made, I have treated the document of 11th *March*, 1862, as a purely voluntary instrument, and, on considering the document itself, such it is in my opinion. It is, I think, obvious, that the conveyance of a leasehold property, which has thirty-five years remaining of its term, and which is then worth 500*L.*, in consideration of a rent of 20*s.* *per annum*, cannot be supported as a purchase for valuable consideration. The inadequacy of the price would be a badge of fraud, if it were so treated (b). Unquestionably, the conveyance may be supported as a voluntary gift by the donor to one he was disposed to favour. If, for instance, it had been conveyed to a charity on such terms, it would not be considered as a purchase by the institution; but it might well be treated as a gift to it, if the instrument had been executed

(a) 1 *Hare*, 464.

(b) See *Townend v. Toker*, 3 *Law J., Chanc.* 608.

executed by a person who understood the full nature and effect of the instrument he was executing. But if it be assumed that I am mistaken in this view of the case, and that the document of the 11th of *March*, 1862, can really be treated as a legitimate sale of the leasehold for a valuable consideration, then it is obvious that this Court could not interfere to cancel a document which was given for value received by the person who signed it, and who did so with a full knowledge of what he was doing, and without any undue influence being used against him.

1865.

 DE HOUGHTON
 v.
 MONEY.

The bill also prays the delivery up and the cancellation of the deed of 10th *June*, 1864; but it follows necessarily, from what I have said, that this Court cannot interfere to order the deed of the 10th *June*, 1864, to be delivered up to be cancelled. If I am right that the document of 11th *March*, 1862, gave Mr. *Money* nothing which he could convey to Mr. *Hook* himself, unless it be a tenancy from year to year, there is nothing more by the deed of *June*, 1864, now vested in them or either of them. It is simply as if a stranger should take upon himself to convey the estate of another to a third person. For the same reason I cannot order Mr. *Money* and Mr. *Hook* to join in executing a proper legal assignment to the Plaintiff of the land in question as prayed by the bill; either there is nothing in them or either of them by reason of the document of the 11th of *March*, 1862, or the deed of the 10th of *June*, 1864, or, if there be, the parties must be left to their remedy at law, and this Court will not interfere.

The bill, in my opinion, fails, as regards the Defendant Colonel *Money* and Captain *Hook*, and must be dismissed against them with costs; the decree against Mr. *Cotton* is of course, but without costs, because it

was

1865.
 Dr HOUGHTON
 v.
 MONEY.

was never opposed by him; in fact it is, in a great measure, for the benefit of Mr. *Cotton* that this suit has been instituted.

NOTE.—Affirmed by Lord Justice *Turner*, December 18, 1866.

Dec. 15, 16.

TAIT v. LATHBURY.

A marriage settlement of personalty empowered the trustees to sell it, and invest the produce in real estate. The estate was to be held on corresponding trusts and to be considered personal estate. There was an express power to sell the securities to be purchased, and to re-invest the produce, from time to time, but no express power to sell the purchased estate. The trustees invested the fund in a real estate:—*Held*, that they had a power of sale over it, and could give good receipts for the purchase-money.

BY the settlement, made in 1836, on the marriage of Mr. and Mrs. *Bryan*, a fund was settled on Mrs. *Bryan* for life without power of anticipation, with remainder for the children of the marriage.

The trustees were empowered, with the consent of Mrs. *Bryan*, to sell the trust stock, funds and securities, and invest the produce in the purchase of freehold or copyhold estates, to be conveyed to the trustees and their heirs, upon such trusts as would best and nearest correspond with the then subsisting trusts, thereinbefore declared, of the said trust stocks, funds and securities, it being thereby declared, that such real estates, when so purchased in pursuance of the power, should be considered personal estate for the purposes of the said settlement and go accordingly. And it was thereby further provided, that it should be lawful for the trustees with the like consent, to make sale of all or any part of the said trust stocks, funds and securities, to be so purchased under the trusts thereinbefore contained, and to place out and invest the monies arising by such sale or sales, from time to time, on good security of freehold, copyhold or leasehold estates by way of mortgage, or upon trust for sale either in *England* or *Wales*, or in government

government securities or parliamentary funds in *England*, and, from time to time, to alter, vary and transpose such securities or funds so to be taken; and the monies placed thereupon should be vested in the trustees, respectively, upon the same trusts, and to and for the same intents and purposes, and with the same powers, as were therein declared concerning the trust stocks, funds and securities, respectively, or such of them as should be then subsisting and capable of taking effect.

1865.
TAIT
v.
LATHBURY.

The trustees, in 1860, sold out the fund (3,886*l.* stock), and invested it in the purchase of a copyhold property at *Turnham Green*.

In 1865, the trustees agreed to sell the copyhold property to the Defendant, Mr. *Lathbury*, for 4,500*l.*, but, though a willing purchaser, he declined to complete, on the ground that the trustees were not empowered, by the settlement, to sell the copyhold and give good discharges for the purchase-money thereof.

Mr. *Eddis* for the Plaintiffs. The trustees have a power to sell this property; it is expressly declared, by the settlement, that it shall be held on similar trusts, which includes the trust for sale and be considered personal estate for the purposes of the settlement and go accordingly. There is also a power to sell and re-invest the produce, and in addition to this, the performance of the trusts will require a sale of the copyholds, for the purposes of a division. In such a case, a power to convert is necessarily given to the trustees; *Master v. De Croismar* (a); *Elton v. Elton* (No. 2) (b).

The trustees have a power to give sufficient discharges

(a) 11 *Beav.* 184.

(b) 27 *Beav.* 634.

1865.

TAIT

v.

LATHBURY.

charges for the purchase-money; *Doran v. Wiltshire* (a); 22 & 23 Vict. c. 35, s. 23.

Mr. *Lewin, contrà*. The trustees, I admit, had power to give good receipts, the trusts being of a permanent character, and it being impossible to throw the responsibility of seeing to the performance of the trust on a purchaser; but here, the trustees have not at present any power to sell. There is no power to sell the real estate, but only the stock, funds and securities. The copyholds were to be held not upon the trusts before mentioned, but "upon such trusts as would best and nearest correspond with the then subsisting trusts," this shews an intention to retain it *in specie* upon corresponding trusts. The lands are to be considered personal estate for the purposes of the settlement and go accordingly, but there is no power to convert them.

Mr. *Eddis* in reply. The question is, whether it was intended that the real estate should remain permanently in the same state of investment; if so, why was it to be considered personal estate. It was personal estate for all the purposes of the settlement, and therefore the investment in real estate was a temporary security for the trust property.

The MASTER of the ROLLS.

I will read the settlement and carefully look into the case. What makes it the more important is this: that both parties seem to wish me to come to the same conclusion.

(a) 3 Swan. 699.

The MASTER of the ROLLS.

In this case I think the trustees have a sufficient power to sell. I think that the effect of it is this: that the real estate is converted into personalty and is to be treated as personal estate through the whole of the settlement. That being the true construction, it is not necessary to go further, as it gave the trustees a sufficient power of selling, and I will so declare.

1865.

TAIT
v.
LATHBURY.
Dec. 16.

ROWE v. TONKIN.

THIS was a motion, on behalf of the Plaintiff, to take a demurrer off the file under the following circumstances:—

The bill was filed on the 13th of *July*, and the Defendants appeared thereto on the 21st of *July*. On the same day and before any interrogatories had been filed, the Defendants filed a demurrer to part of the bill, viz.:—to so much of the bill as sought an account of what was due from the testator in respect of a debt of 100*l.* and interest; but they filed no plea or answer to the rest of the bill. The time for filing interrogatories (*a*) (which was within eight days after the time limited for the appearance of the Defendants, i. e., eight days after service of the bill (*b*)) had not expired when this demurrer was filed; but the Plaintiff afterwards, on the 28th of *July*, filed interrogatories.

Nov. 2.
A demurrer to part of the bill, unaccompanied by a plea or answer to the rest, which is put in before the expiration of the time for filing interrogatories, is irregular; but whether it would be regular if accompanied with a voluntary answer to the rest of the bill, *quære*.

Mr. *Southgate* and Mr. *Bevir* in support of the motion. It is irregular to file a partial demurrer before the time

(*a*) *XI. Cons. Ord.* § 2.

(*b*) *X. Cons. Ord.* § 3.

1865.

 ROWE
 v.
 TONKIN.

time to file interrogatories has expired. It is wholly inconsistent, in point of pleadings, with the right of the Plaintiff to a discovery. Before the 15 & 16 *Vict.* c. 86, s. 12, which enacts, that "no Defendant shall be called upon or required to put in any answer to a bill, unless interrogatories shall have been filed," it was irregular to file a demurrer to part of a bill without pleading to or answering the rest. That act has not altered the practice. The case of *Burton v. Robertson* (a) is distinguishable, for there, the time for filing interrogatories had expired, and none had been filed when the Defendant put in his partial demurrer. The Defendants could not file a voluntary answer, and, therefore, they could not file a partial demurrer.

Mr. *Selwyn* and Mr. *Freeling* for the Defendants. This proceeding was quite regular, and the difficulty, if any, arose from the course taken by the Plaintiff. He might have filed his interrogatories with the bill, and if he has chosen to delay filing them, the Defendants ought not to be prejudiced in their defence, and were entitled to meet the Plaintiff's record as it stood. The Defendants might have demurred to part of the bill and have filed a voluntary answer to the rest; *Anderson v. Stamp* (b). That case shews that a voluntary answer might be filed under similar circumstances to the present. Under the old practice, the bill prayed a subpoena to appear and answer all and singular the premises; the Defendant was, therefore, bound to answer the whole bill, whether interrogated or not; but now he is not, and here the Defendant has answered all he was bound to answer. A Defendant might be deprived of his defence in the cases of *ne exeat* or injunction, if he were not permitted to file his demurrer *instantly*. There is

(a) 1 *Johns. & Hem.* 38.

(b) 34 *L. J., Ch.* 230.

is great convenience in such a practice, for if the demurrer to part of the bill be valid, interrogatories founded upon that part of the relief would be nugatory.

1865.


ROWE
v.
TONKIN.

The MASTER of the ROLLS.

I think this demurrer is irregular. The distinction between this case and *Burton v. Robertson* is this: here the Defendants have not waited for sixteen days allowed to the Plaintiff to file his interrogatories, as was done in that case.

I consider that, until sixteen days have expired, matters remain very much in the same position as under the old practice before the new act and orders altered the rules of pleading. I consider it certain, that under the old practice, a Defendant as soon as the bill had been filed might demur to the whole, but not to a part only of the bill; he might file a demurrer to part and answer the other part, for there was nothing to prevent his putting in his answer as soon as he pleased. But a Defendant could not put in a demurrer alone to part of the bill; and, if he did, the Plaintiff would be entitled to come to the Court to have it taken off the file for irregularity.

That being so, and assuming that a Defendant is entitled to file a demurrer to part of the bill accompanied by a voluntarily answer to the other part of the bill (on which point I express no opinion), still I think that he cannot, before the sixteen days have expired, file a demurrer to part of the bill without an answer to the other part, and that this is irregular.

This demurrer is therefore irregular, and must be taken off the file.

1865.

SIDNEY v. CLARKSON.

Nov. 24, 25.

Building land was sold in a number of lots, subject to certain conditions as to fencing, repairing the roads, and to restrictions as to the class of houses to be built. The conditions also provided, that statements to this effect should be inserted in the conveyances. By the 15th condition, the vendor reserved the right of selling the unsold lots under different arrangements, "and either subject to or not subject to the stipulations as to fencing and other stipulations contained in the particulars or the conditions."

Held, first, that as to the unsold lots the vendor was subject to none of the restrictions: secondly, that the purchasers were bound to have not only the restrictive conditions stated on their conveyances, but also the 15th, in favor of the vendor: and thirdly, that a separate deed of covenant by a purchaser as to the restrictions was a sufficient compliance with the provision as to the statements on the conveyances.

THE *Walton Lodge* estate, consisting of 247 acres, was put up for sale by the Plaintiff, subject to special conditions, in sixty lots,

The particulars of sale described the estate as "offering most eligible sites for the erection of first-class villas," and they provided, that the purchasers of certain lots should fence against the neighbouring lots, as shewn on a plan.

The material conditions of sale were as follows:—

"The 9th related to contributing to keeping the roads in repair.

"The 10th condition provided, that the purchasers of lots 1 to 29 (inclusively), 48, 59 and 60, should not erect, on any of such lots, any building, except detached or semi-detached private dwelling-houses, of the value, at the least, of 800*l.* and 600*l.* respectively; and that they would not use such dwelling-houses, or permit them to be used, otherwise than as private residences."

The 11th condition was as follows:—

"Statements, to the effect of the two last preceding conditions, shall be inserted in the conveyances to the purchasers whom they may respectively affect, and such statements—

statements shall have the force and effect of contracts binding in equity."

1865.

SIDNEY
v.
CLARKSON.

The 15th was in the following words:—

"The vendor reserves the right of selling the unsold lots, or any of them, at such time, and in such manner, and under such different arrangements, as to him may seem fit, *and either subject to or not subject to the stipulations as to fencing and other stipulations contained in the particulars or these conditions.*"

The Defendants became the purchasers of lots 48 and 59 for 2,260*l.*; but all the other lots referred to in the 10th condition of sale were bought in by the Plaintiff, with the exception of lots 3 and 4, which were sold.

The title to the property had been accepted, but disputes arose between the parties as to the form of the conveyance. The purchasers were willing to covenant to the effect of the 9th and 10th conditions; but they insisted that the vendor should enter into similar covenants in respect of the unsold lots. This he refused to do.

The purchasers were also willing to omit all covenants relating to these conditions, and to introduce, into the conveyance to them, a statement of the 9th, 10th and 11th conditions, but omitting the 15th.

During the progress of the suit, the Defendants discovered another objection, which was as follows:—

"In the conveyance of lot 3 to the purchaser there was no restrictive covenant to the effect of the 9th and 10th conditions of sale, nor any allusion to them; but the purchaser executed a separate deed of covenant with the restrictions pointed out by those conditions. A memorandum of this deed of covenant was afterwards indorsed on the conveyance.

Mr.

1865.

~
SIDNEY

v.

CLARKSON.

Mr. *Schuyr*, Mr. *Joshua Williams* and Mr. *Druce*
for the Plaintiff.

Mr. *Baggallay* and Mr. *Griffiths* for the Defendants.
The object of the vendor was to build upon the land according to a general plan, and it was not intended to vary it in any essential particulars. The stipulations against building inferior houses on the lands laid out for building was not for the benefit of the vendor alone, but of all persons taking plots to build on, and the obligations were to be reciprocal as regards all purchasers. If the Plaintiff thinks proper to relax the obligation relating to the class of houses as to one purchaser, he, in equity, at least, dispenses with the obligation as to the rest; *Roper v. Williams* (a). There would be no mutuality if it were otherwise, for the Defendants would be kept bound by the restriction, while future purchasers of other lots would be free to build a series of inferior houses adjoining the Defendants' land.

A vendor is bound to state clearly and fairly on his condition of sale what he intends to stipulate for; if he expresses himself ambiguously, the construction must be most favourable to the purchaser; *Symons v. James* (b); *Seaton v. Mapp* (c). A vendor selling land in lots for building purposes must be understood to hold out expectations that it will be laid out in the manner intended; *Peacock v. Penson* (d). Here the purchasers have been entrapped by the condition, they swear they never would have purchased, if they were to be restricted in their rights, while purchasers of all the other lots were to be let free.

The

(a) *Turn. & R.* 22.(b) 1 *Y. & Coll. (C. C.)* 490.(c) 2 *Coll.* 562.(d) 11 *Beav.* 355.

The 15th condition applies to the roads, fencing, &c.; but it is inoperative as to the class of houses; the 10th condition is imperative: it says, no house "shall" be erected except of a particular description.

1865.
— ~
SIDNEY
v.
CLARKSON.

If the 9th, 10th and 11th conditions were introduced into the Defendants' conveyance, omitting the 15th, and a subsequent purchaser built small houses, the Defendants would have a right of action against the vendor. This is really what was contemplated.

Secondly. The separate deed of covenant is insufficient; it will not bind purchasers without notice, and the Defendants have a right to evidence that the purchaser consented to the indorsement on the conveyance, in order to shew that he is bound by it.

The MASTER of the ROLLS.

I am of opinion that the Defendants have mistaken their rights, and that the Plaintiff is entitled to a decree. The argument of the Defendants is, that the Plaintiff wants to get something he has not contracted for. What he contracted for was this:—the purchasers of certain lots under a sale by auction were not to erect any buildings thereon except private dwelling-houses of a certain value, and this stipulation was to be inserted in their conveyances, and was to have the force and effect of contracts binding in equity. If it stopped there, all the cases cited would apply; it would be a condition for the benefit of the vendor and purchasers, and would bind all purchasers, and Mr. *Sidney* could not afterwards sell any lots, except subject to this condition.

To provide against this, he introduces the 15th condition,

100.
101.
102.
103.

and in which he reserves the right of selling the same in such manner and under such different arrangements as to him may think fit, and either subject or not subject to the stipulations" contained in the conditions of sale.

The Defendants insist that they are entitled to have such a conveyance as would make it appear, on the face of it, that every person who afterwards buys any of these houses will be bound by the condition as to the houses to be built, although the Defendants have bought subject to this 5th condition, which says, that they should not necessarily be bound by any of these stipulations. They then say that as the 9th and 10th conditions are inserted in their conveyance, they are not bound to have the 15th inserted in it also, because, they say, that the 10th condition provides only that the 9th and 10th conditions should be inserted in their conveyance, and does not specify anything else. This, however, the Judge is certain — that the vendor is entitled to say, that in the conveyance to the Defendants he must state if the title shall appear, and that he shall not be prevented selling the other lots unfettered by the same covenants and conditions. The argument seems on the Defendants' side, for if the 15th condition were inserted in their conveyance, and the Plaintiff afterwards sold the other lots unfettered by the 10th condition, and the purchaser built houses of less value than those described in that condition, a right of action on the part of the Defendants would, on the face of the deed, arise, and the Plaintiff would be obliged to come to this Court to say the action, the contract between him and the Defendants being, that he should not, as to these lots, be subject to these conditions. Whatever the agreement is, the law and the whole truth should be stated in the conveyance to the Defendants, in order that

that no persons may be misled in future. I am of opinion that the facts should appear on the conveyance to the Defendants, in order that future litigation may be prevented.

1865.
SIDNEY
v.
CLARKSON.

As to the other point, I am of opinion that the separate deed of covenant is proper; but that the covenantee ought to have possession of it, in case the covenant should hereafter be broken. If there had not been a separate deed of covenant, a counterpart of the deed of conveyance would be necessary. Then, the fact being that there is a separate deed of covenant, the question is, how to prevent a future purchaser being misled. The means are simply by an indorsement of notice of the deed of covenant on the conveyance. This is all that is required.

I am also of opinion that there is nothing in the condition of sale to decoy a man into purchasing. The 15th condition was introduced merely to prevent the seller from being fettered in future, in case any of the lots should remain unsold. The fact of there having been only two or three lots sold may be a great inconvenience to the Defendants, but I think that was a question on which they were bound to inquire, and having chosen to purchase subject to the 15th condition, I think that those lots only which were disposed of at the sale had the 9th and 10th conditions imposed on them.

There must be a decree for specific performance with costs, and a reference to settle the conveyance if the parties disagree.

1865.



HENNIKER v. CHAFY.

Nov. 18.

A petition, presented by a tenant for life, for payment of the income of a fund paid into Court under the Lands Clauses Act, and which fund was the subject of an administration suit, was served on the trustees:—

Held, that the company must pay the trustees' costs.

IN 1846, lands were taken by a railway company, which were the subject of an administration suit in this Court. The purchase-money had been paid into Court, and had accumulated according to the trusts. The accumulation having ended, a petition was presented by the tenant for life for payment to him of the dividends. This was served on the railway company and on the trustees of the fund.

Mr. *Burdon* in support of the petition.

Mr. *Holland*, for the railway company, submitted that, under the "Lands Clauses Consolidation Act, 1845" (8 & 9 Vict. c. 18, s. 80), the company was not liable to pay the costs of the appearance of the trustees. He cited *Hore v. Smith* (a); *Wilson v. Foster* (b); *Sidney v. Wilmer* (c); *Henniker v. Chafy* (d).

Mr. *Goring*, for the trustees, was stopped by—

The MASTER of the ROLLS.

I must follow my own decision, the trustees must have their costs.

(a) 14 Jur. 55.
(b) 26 Beav. 398.

(c) 31 Beav. 338.
(d) 28 Beav. 621.

1865.

LAKE v. PEISLEY.

Dec. 16.

THE Secretary of the Master of the Rolls had declined to make an *ex parte* order, under the 9th Consolidated Order, rule 4, for liberty to use, in this suit, at the hearing, the proceedings in bankruptcy, including the depositions and schedules of accounts, and the Vice-Chancellor *Stuart*, to whom the cause was attached, had also declined to interfere.

An order of course made, saving just exceptions, under the 19th Consolidated Order, rule 4, to read proceedings in bankruptcy at the hearing of the cause.

Mr. *J. N. Higgins* now applied *ex parte* for the order. He referred to *Ernest v. Weiss* (a); in which an order of course had been made to read in a suit evidence taken in a winding-up, saving just exceptions.

The MASTER of the ROLLS.

I think it is an order of course, and you may inform the Secretary that I think so. The order may extend to all the proceedings, but it will be open to all parties to object to their admissibility at the hearing.

(a) 1 N. R. 6.

1865.

Dec. 12.

DENT v. DENT.

By a consent order made in an administration suit, a purchaser was to be bound by any order, as if he were a party to the suit and his contract had been the subject of it. Upon a dispute arising between the purchaser and vendors: *Held*, that the purchaser was entitled to call on the vendors to make an affidavit of documents and to produce them.

MR. *BIRD* had entered into a contract with the trustees of a will for the purchase of an estate.

This was a suit for the administration of the estate of the testatrix, but to which Mr. *Bird* was not a party. However, on the 8th of *December*, 1862, an order had been made in the suit, on the application of the trustees and upon the appearance and consent of Mr. *Bird*, that the contract should be carried into effect, Mr. *Bird* consenting to be bound by this or any other order, as if he had been a party to the cause and the contract had been specially the subject thereof.

Disputes having afterwards arisen as to boundaries of the property and in consequence of adverse claimants on part of it, Mr. *Bird* claimed, in Chambers, to be entitled to compensation, and he took out a summons that the trustees might make the usual affidavit of documents in their possession. This summons was adjourned into Court for argument.

Mr. *Southgate* and Mr. *Druce* for Mr. *Bird*. The purchaser is, under the order of 1862, to be treated as a party to the suit. The dispute between him and the trustees is therefore to be determined in this suit, and he is consequently entitled to the usual production of documents.

Mr. *Karslake* for the trustees. The applicant is not a party to the suit, and is not entitled to call on the vendors to make an affidavit of documents.

The

The MASTER of the ROLLS held, that the applicant, being in the situation of a party to the suit, was entitled to the order asked, for otherwise he would be entitled to enforce the discovery he required by a separate suit. He accordingly ordered the trustees to file a full and sufficient affidavit, stating whether they had in their possession or power any documents "relating to the matters in question between them and the applicant," and he also made the usual order for their production.

1865.

~
DENT
v.
DENT.

Reg. Lib. 1865, A., fol. 2425.

CHUBB v. GRIFFITHS.

THE Defendant, an infant, had advertised second-hand iron safes for sale and sold which he represented and were marked as manufactured by the Plaintiff, Mr. *Chubb*. They were, however, spurious and inferior articles.

The Plaintiff instituted this suit for an injunction and an account.

Mr. *Jessel* and Mr. *Bunting* for the Plaintiff.

Mr. *Archibald Smith*, for the infant, submitted to a perpetual injunction, but he argued that this was not a case for costs as against an infant; that the proceedings of the Plaintiff had been unnecessarily precipitate, the
Defendant

Dec. 15.

An infant who had sold spurious articles, representing them to have been manufactured by the Plaintiff, ordered to pay the costs of suit for an injunction.

1865.
CHUBB
v.
GRIFFITHS.

Defendant having acted in ignorance and having at once submitted.

The MASTER of the ROLLS.

I do not think that the Plaintiff is to blame for coming speedily for an injunction; it was his duty to do so.

But I think that the Defendant, who sells articles and declares positively that it is *Chubb's* manufacture, is not at liberty to say that he was ignorant of the fact. He was bound to make proper inquiry before he made so positive a representation.

In such a case, I am of opinion, upon the principle laid down in *Cory v. Gertcken (a)*, that infancy cannot protect him from paying the costs of this suit.

(a) 2 *Madd.* 40.

Reg. Lib. 1865, A., fol. 2417.

1865.

BONVILLE v. BONVILLE.

Dec. 14.

THE ordinary partnership decree was made on the 20th of April, 1860, which directed an account to be taken of the partnership dealings and transactions, and that what, upon taking the said account, should be certified to be due, from either of the parties to the other of them, should be paid by the party from whom to the party to whom the same should be certified to be due.

Under the common decree in a partnership suit, interest is payable, on the balance found due from one partner to another, from the date of the certificate.

The Chief Clerk, by his certificate dated the 23rd of June, 1865, found 380*l.* to be due from the Plaintiff to the Defendant, and the cause came on for further consideration.

The costs of a suit to take the partnership accounts are ordinarily paid out of the partnership assets.

Mr. *Hobhouse* for the Plaintiff.

Mr. *Speed*, for the Defendant, asked that the Plaintiff might pay interest from the date of the certificate, and also the costs of the suit.

Mr. *Hobhouse* in reply.

The MASTER of the ROLLS.

I cannot give the Defendant costs. The practice, except there be something very unusual in the case, is, to make the costs in partnership suits payable out of the assets.

But the Plaintiff must pay interest at the rate of 4*l. per cent.*, from the date of the certificate on the amount due, for the decree directs payment of the balance due as soon as it is ascertained.

Reg. Lib. 1860, A., fol. 1328; Seton, Ch. 2, § 7.

1865.

Dec. 20.

YEOMANS v. WILLIAMS.

A. B., to whom his son-in-law had, by deed, mortgaged some property, declined to receive the interest, and afterwards, to induce his son-in-law not to sell and reside on the mortgaged property, he had promised to allow him to live there rent free. The son-in-law acted on the promise until *A. B.*'s death:—*Held*, that, in equity, no interest was payable until that time.

IN 1843, the Plaintiff, Mr. *Yeomans*, married the daughter of the testator, Mr. *Richards*.

In 1855, Mr. *Yeomans* mortgaged a house and premises near *Birmingham* to the testator for 1,000*l.*, which he covenanted to repay with interest at 4*l. per cent. per annum*.


The Plaintiff in his affidavit stated that when in *August*, 1855, he offered to pay the testator the interest; the testator declined to receive it, and said he would make the Plaintiff and his wife a present of it, and added, that he only expected the Plaintiff, in future, to keep up the fire insurance on the property.

The Plaintiff's wife also deposed to a conversation with the testator, shewing that he never intended to be paid any interest. In fact interest had never been paid to or asked for by the testator.

In 1862, an estrangement took place, and Mrs. *Yeomans* wrote to the testator that her husband intended to sell the property and pay off the mortgage. To this the testator and his wife, in a letter to Mrs. *Yeomans*, replied in the following terms:—

“ You wrote to tell me you should sell your house to pay me. Did I ever ask you to do it, or have you paid me a penny since you had the money from me, or ever took the least notice about it? You can remain where you are. You cannot sell the house, and I hold the deeds. You can live there, just as you do now, without paying us any rent; it is not wished that you should

should give it up; if you give it up, you must get some place, and that you must pay for. We can only say we wish you every blessing if we never see you, but must tell you candidly you will never see us at *Erdington*.

1866.

 YEOMANS
 v.
 WILLIAMS.

"With our kind respects to Mr. *Yeomans*,
 "We remain, dear *Mary Ann*, yours sincerely,
 "*James and Jane Richards*."

In consequence of this letter, Mr. *Yeomans* did not proceed to a sale of the premises comprised in the mortgage.

The testator died in *September*, 1862.

Upon a bill for redemption, the Plaintiff, Mr. *Yeomans*, contended that the testator had released him from the payment of interest down to his death.

Mr. *Baggallay* and Mr. *W. R. Fisher*, for the Plaintiff, contended that no interest was payable prior to the death of the mortgagee; *West v. Fritche* (a).


Mr. *Haynes* for the Defendants. There is a covenant to pay, which cannot be released either by mere parol or by a declaration of making a voluntary gift. Unless there be a discharge from the debt at law, there is none in equity; *Cross v. Sprigg* (b).

The MASTER of the ROLLS.

I think the Plaintiff is entitled to redeem on payment of interest from the last day when interest accrued before

(a) 3 *Esch. Rep.* 216.

(b) 6 *Hare*, 552.

1865.

 YEOMANS
 v.
 WILLIAMS.

fore the death of the testator. I do not understand that the Vice-Chancellor, in *Cross v. Sprigg*, meant to lay down this proposition:—that a man may not let a farm to another, and say “you shall hold it rent free,” or that a man may not say “you may occupy it at a nominal rent, or you may live there, and I never intend to call on you to pay any rent.” Is there anything, in this, contrary to law, or which equity would not think fit to enforce? or is there any such equitable rule which applies to interest, because a verbal promise is no release at law?

I am disposed to think that this case would come under another head of equity:—I allude to those cases in which a person promises another to do something for him as an inducement to him to take a different course of life. This Court, in such cases, compels the promiser to make good his promise. If a son-in-law says “I am not rich enough to live in my present residence, and I intend to sell it, and the father-in-law replies, “Don’t sell it, continue to reside there, I will not charge you with rent,” or “I will pay the rent for you,” it would be difficult, when the son-in-law has relied on that promise, to say that the Court would not give effect to it.

In such cases, there is this distinction between principal and interest:—if he intended to give up the principal, why did he not give up the security; but to keep the security is consistent with releasing the interest.

I must hold that all interest is released up to the last day of payment of interest to the testator’s death, and I must make the usual redemption decree.

NOTE.—See *Flower v. Marten*, 2 Myl. & Cr. 459.

1865.

HARDWICK v. WRIGHT.

July 14, 17.

Nov. 17.

ON the 24th of *August*, 1852, the Plaintiff, Mrs. *Hardwick*, intermarried with the Defendant, *Albert Hardwick*, a draper, at *Windsor*.

She was, at that time, entitled for life to a reversionary interest in a sum of 5,000*l.* £3 : 5*s.* per Cents. expectant on the decease of her mother, which was settled on her for her separate use. There was no restraint against anticipation, and no settlement was made on her marriage.

Five months after the marriage, Mr. *Hardwick* was compelled to come to an arrangement with his creditors, whose claims he was unable to discharge. By the deed, his creditors were to be paid by four instalments at three, six, nine and twelve months, to be secured by Mr. *Hardwick's* promissory notes, and the payment of those at nine and twelve months was to be secured by the covenant of Mr. *Wright*, as his surety. The liability thus incurred by Mr. *Wright* was to be secured by the assignment from Mr. *Hardwick* to Mr. *Wright* of all Mr. *Hardwick's* estate, goods and effects, whatsoever and wheresoever; and, in addition, by the assignment by Mrs. *Hardwick* of her reversionary life interest

As between principal and surety, if the primary security prove worthless, whether it was so originally or whether it becomes so afterwards, the surety is not discharged, unless the loss or deficiency of the original and primary security was occasioned by the act of the creditor.

In *March*, a trader assigned all his goods, &c. to *A. B.*, to secure a composition to his creditors, and *A. B.* became liable for the payment. The wife of the trader became surety to *A. B.* in respect to her separate estate. In

trader was made bankrupt, and *A. B.* entered into an arrangement by which he gave up the goods to the assignee:—*Held*, that *A. B.'s* assignment was an act of bankruptcy, and that the wife's separate estate as surety was not released.

When a Plaintiff has delayed filing her bill for ten years, the time which has elapsed ought to preponderate in the Defendant's favor, where the evidence is conflicting, and the balance of it is even.

CASES IN CHANCERY.

in the sum of 5,000*l.* settled on her for her use.

Accordingly, by indenture dated the 23rd of *March*, Mr. *Hardwick* assigned to Mr. *Wright* his lease-trade premises, and his stock-in-trade, credits and liabilities, for the purpose of enabling him, "at his discretion as he should think proper," to provide for the payment of the promissory notes, and to repay himself advances, with power to sell, for that purpose, sooner or later after the execution of" this indenture.

By an indenture of even date, Mrs. *Hardwick* assigned to Mr. *Wright* her interest in this sum of 5,000*l.* provide for the payment of the instalments and to repay Mr. *Wright* his advances. Mr. *Wright* did not, at first, take possession of the business, but having received sufficient to pay the first two instalments, he paid them. The third instalment became due on the 24th of *November*, 1853, but Mr. *Hardwick* was unable to provide the funds to pay it, and, after some negotiation, Mr. *Wright* on the same day took possession. Mr. *Hardwick*, on the following day (25th of *November*), signed a declaration of insolvency, upon which he was adjudicated bankrupt on the following day.

After some discussion between Mr. *Wright* and the assignees, an arrangement was come to between them; and, by an agreement, dated the 9th of *January*, 1854, and made between the assignees of the one part and Mr. *Wright* of the other part, it was agreed (among other things) that Mr. *Wright* should not be entitled to prove under the bankruptcy in respect of any payments theretofore made by him to any creditors, parties to the creditors' deed, on account of the third instalment, and that he should pay the assignees 200*l.* in satisfaction of all

all the claim they might have against him on account of moneys received prior to the bankruptcy or otherwise, and that he should relinquish to the assignees the stock-in-trade, book debts, leasehold and other property of the bankrupt claimed by him (*Mr. Wright*) under the deed of the 23rd of *March*, 1853.

1865.
HARDWICK
v.
WRIGHT.

In *February*, 1856, *Mr. Wright*, having paid 1,038*l.* on behalf of *Mr. Hardwick*, sold *Mrs. Hardwick's* interest in the fund for 800*l.*

The tenant for life died in *February*, 1863.

In *October*, 1863, *Mrs. Wright* instituted the present suit, charging the Defendant with negligence in leaving the stock-in-trade in the bankrupt's order and disposition, and insisting that she was released thereby.

She also, by her bill, charged, that the agreement of the 9th of *January*, 1845, had not been executed with her privity or concurrence, or approved of by her solicitor, and that, by means thereof, the position of the Plaintiff, as surety, had been prejudiced, and that she was, by means thereof, released from being such surety.

The bill prayed a declaration, that, by means of the agreement of the 9th of *January*, 1854, and the other acts of *Wright*, the Plaintiff was released from her suretyship, and for a reconveyance of her property and an account.

Mr. Selwyn and *Mr. A. Smith*, for the Plaintiff,
cited

1865.

HARDWICK
v.
WRIGHT.

CASES IN CHANCERY.

cited *Pearl v. Deacon* (a); *Pledge v. Buss* (b); *Capel v. Butler* (c); *Ex parte Mure* (d).

Mr. Jessel, Mr. Bayley and Mr. G. O. Morgan for
Mr. Wright.

Mr. Selwyn in reply. *Wheatley v. Bastow* (e).

The MASTER of the ROLLS.

Nov. 9.

The real question to be determined is, whether the acts of *Wright*, subsequently to the execution of the indenture of 23rd of *March*, 1853, and the arrangement he entered into with the husband's assignees in bankruptcy, have discharged the Plaintiff from her suretyship.

I have no hesitation in declaring my opinion to be, that, unless the Defendant *Wright* has forfeited the right he had under these deeds, the reversion of the Plaintiff was and is liable to make good any advances made by him.

The real question is, whether the subsequent acts of the Defendant have deprived him of that right. The Plaintiff's counsel contend that the effect of the deed of the 23rd of *March*, 1853, is, merely to make the Plaintiff a surety for so much as the husband's property would not produce for the liquidation of the sums paid by *Wright*, and that the arrangement made between the Defendant

Reas. 186, and 1 De

(c) 2 Sim. & St. 457.

(d) 2 Cox, 63.

(e) 7 De G, M. & G. 27

Defendant *Wright* and the assignees in bankruptcy of the Plaintiff's husband, in *January*, 1854, is a release of such suretyship, inasmuch as the effect of it was, that the whole of the husband's property was not applied, in the first instance, in discharge of what was due to the Defendant. To determine this, we must examine the transaction itself. It was occasioned by the following circumstances:—On the 25th of *November*, 1853, the Defendant *Hardwick* signed a declaration of insolvency, and, on the following day, he was adjudicated a bankrupt. The effect of this was, that the deed of 23rd of *March*, 1853, which was in my opinion an act of bankruptcy, became invalid as against the creditors of the bankrupt, who were then entitled to avail themselves of the deed as an act of bankruptcy. If this be a correct view of the case, then the assignees of Mr. *Hardwick* might have taken possession of the whole property and left the Defendant *Wright* without any redress or repayment, except so much only as he might be able to obtain on proof of his debt under the bankruptcy.

1865.

 HARDWICK
 v.
 WRIGHT.

In this state of things, the arrangement of the 9th of *January*, 1854, was entered into. I am of opinion that, by this arrangement, the Defendant *Wright* gave up nothing that he could have retained; and if this be so, it cannot be said that he gave up or lost a security, the value of which could not be ascertained, and that, by reason thereof, the surety is discharged either *in toto* or *pro tanto*. If the primary security proves to be worthless, whether it was so originally, or whether it became so afterwards, this does not discharge the surety, unless the loss or deficiency of the original and primary security was occasioned by the act of the creditor.

In this case, I am of opinion that no act of the Defendant

1865.
~
HARDWICK
v.
WRIGHT.

pendant, *Wright*, has made the assignment of the goods and lease of the Plaintiff's husband valueless. What, in truth, did make it so was, the declaration of insolvency by Mr. *Hardwick* on the 25th *November* following, which enabled his creditors to avail themselves of that deed as an act of bankruptcy.

It is true that Mr. *Wright* did not contest the matter with the assignees, but no man is required to litigate a question where the law is against him; and the real question on this deed is, whether it was or was not an act of bankruptcy which could be set aside by the creditors of the bankrupt. If he has mistaken the law, he must take the consequences; but, in my opinion, he was rightly advised as to the character of that deed, and the course he took was the best, not merely for himself but also for the Plaintiff, as by it he got (which, however, as events have turned out, must be admitted to have been valueless) the contingent reversionary interest in the testator's property given to the Plaintiff and not settled for her separate use, which, in the event of such reversionary interest falling into possession during the life of the Plaintiff's husband, would have belonged to the assignees.

I am of opinion, therefore, that the arrangement made by Mr. *Wright* with the assignees of Mr. *Hardwick*, did not occasion any loss or injury to the original security given by Mr. *Hardwick* by the deed of *March*, 1853; consequently, that the Plaintiff was not prejudiced by such arrangement, and that the property which she conveyed, as a further security to Mr. *Wright* for his advances, remained still applicable for that purpose.

There is still another circumstance, which, although
it

it has not formed any part of the grounds on which I have found myself compelled to decide against the Plaintiff, ought not to be passed by without notice, and it is this:—The arrangement, made by the Defendant *Wright* with the assignees of *Hardwick*, took place early in *January*, 1854; the sale of the Plaintiff's reversionary interest in the 5,000*l.* took place in *February*, 1856; both these facts were well known to the Plaintiff and her advisers at the time when they occurred. All that is known to them now was known to them then, yet no step was taken, either to prevent the sale of the reversion or to insist on the release of the Plaintiff's property, by reason of the arrangement with the assignees in *January*, 1854, until the reversion fell into possession, by the death of the tenant for life in *February*, 1863, and then, nine years after the transaction complained of and when the evidence of assent or dissent becomes less trustworthy, and in *October*, 1863, this bill is filed.

1865.
HARDWICK
v.
WRIGHT.

Absence from this country or insufficient means does not justify this delay, and this delay would entitle the Defendant *Wright* to insist, that, in any conflict of evidence where the balance is even, the time which has elapsed is an element which ought to preponderate in his favour. However, I have treated the matter as if the arrangement of *January*, 1854, had been recent and entered into against the will of the Plaintiff.

The decree will be, (at the option of the Plaintiff,) either to have the bill dismissed, or to direct an account of the receipts and payments of the Defendant *Wright*, in the ordinary form; but, in either case, the Defendant *Wright* must have the costs of the suit up to the present time.

1865.



WHITWELL v. ARTHUR.

Nov. 7, 10.

A. B. having been rendered incapable of performing his partnership duties, his partner filed a bill against him for a dissolution. Afterwards and before the hearing, *A. B.*'s health improved:—
Held, that there was not sufficient ground for dissolving the partnership, and all proceedings were stayed, with liberty to apply.

THE Plaintiff and Defendant entered into partnership as chemists and druggists for a term, of which about two years remained unexpired.

In *January*, 1864, the Defendant was seized with paralysis, which incapacitated him from attending to his duties as a partner.

In *November*, 1864, the Plaintiff instituted this suit to dissolve the partnership in consequence of the incapacity of the Defendant.

Mr. Woodroffe, for the Plaintiff, insisted that the state of the Defendant's health rendered it impossible for the partnership business to be continued, and that the nature of the business rendered it perilous to the Plaintiff to have it attended to by an incompetent person. That the Plaintiff was therefore entitled to have the partnership dissolved and the accounts taken.

Mr. Selwyn and *Mr. Eddis*, for the Defendant, argued, that the Defendant's inability had been temporary, that his health was now restored, and that consequently that there was no sufficient ground to justify a dissolution of the existing partnership.

The MASTER of the ROLLS.

Nov. 10.

This is a suit for the dissolution of a partnership on the ground of the permanent incapacity of the Defendant.

fendant. The Defendant was seized with a paralytic attack in *January*, 1864, and in *November* following the bill was filed. I think, on reading the evidence, that during the whole of this interval the Defendant was incapable of performing the duties which he had covenanted to perform by the articles of partnership. But I think he has improved in health since that time, and that in *June*, 1865, down to which time the medical evidence extends, he was competent to perform his duties, though I cannot say he was then perfectly competent or as competent as he had been previous to his illness. I think, on the evidence, that there is not sufficient to justify the dissolution of the partnership, and the medical men look forward to an improvement in his health.

1865.
WHITWELL
v.
ARTHUR.

I cannot dissolve the partnership, but the Plaintiff was entitled to file this bill, for he might reasonably think, that the Defendant would not be able to perform his duties. I at first thought of dismissing the bill without costs; but as a new suit might become necessary, I think that the proper course would be to stay all further proceedings and to reserve liberty to apply. If the Defendant should continue to improve, this would be the same as dismissing the bill without costs; but if his health should fail, the result of this order would render the expense of another suit unnecessary.

Therefore, stay all further proceedings in this suit, with liberty to apply.

NOTE.—See *Sadler v. Lee*, 6 Beav. 327; *Leaf v. Coles*, 1 De G., M. & G. 171; *Besch v. Frolich*, 1 Phil. 172.

1865.

Nov. 13, 14.
Dec. 4.

CHEESMAN *v.* PRICE.
PRICE *v.* CHEESMAN.

By articles of partnership for a term between *A.* and *B.*, all bills were to be signed by *A.* only. *B.* drew a bill on a customer for the amount of his bill:—

Held, that this was not a substantial violation of the articles.

The failure of one partner to enter in his accounts partnership moneys received by him is, of itself and independent of any provisions in the articles of partnership, a sufficient ground for the other partner dissolving.

By articles of a partnership for a term, each partner was to keep proper books of account and to enter all his

IN 1860, the Plaintiff, Mr. *Price*, a tailor, took the Defendant, Mr. *Cheesman*, into partnership. By the articles, the partnership was to continue ten years, determinable as after mentioned. *Price* was to be entitled to three-fourths of the profits, and *Cheesman* to one-fourth.

The 9th article was as follows:—

“That all cheques, bills, notes or other negotiable securities, which may be given, signed, accepted or indorsed on behalf of the partnership, shall be signed, accepted and indorsed in the name of the firm by *Price* only, or by *Cheesman*, if previously authorized to do so by *Price* by some writing under his hand.”

By the 10th, *Price* was to be at liberty to draw 36*l.* monthly, and *Cheesman* 12*l.* monthly, out of the profits.

The 14th, “Each of the partners shall keep or cause to be kept good and proper books of account, in which shall be entered all the receipts and payments, dealings and transactions of the partners, respectively, in the course of the partnership business, in the manner usually adopted in a business of the like nature, and

Cheesman

receipts, and in default the other might dissolve the partnership. One partner had made small omissions in seventeen instances, which, in the aggregate, amounted to 9*l.* 10*s.*:—*Held*, that this justified the other in dissolving the partnership.

Cheesman shall, from time to time, furnish *Price* with proper memorandums of all the receipts and payments, dealings and transactions of him, *Cheesman*, in the course of the business, in order that the same may be duly entered."

1865.
—
CHEESMAN
v.
PRICE.

The 18th provided (amongst other things), that if *Cheesman* "should wilfully neglect or refuse to keep just and proper accounts, as thereinbefore provided, or should do anything repugnant to clauses 6 or 9," *Price* should be at liberty to dissolve the said partnership by giving a written notice, and thereupon the said partnership should, from the time of giving or leaving such notice, cease and determine.

The 20th article provided, that in case of a dissolution by notice given by *Price* to *Cheesman*, under clause 18, *Cheesman* should be considered to have quitted the business for the benefit of *Price*. On breach of article 18 *Cheesman* was to pay *Price* 1,000*l.* for liquidated damages.

The partnership commenced in *July*, 1860, and the Defendant was principally employed in attending in the country.

On the 21st of *July*, 1863, *Price*, alleging that *Cheesman* had violated the above articles, gave him a written notice declaring the partnership dissolved.

The particulars of these violations are stated in the judgment.

In *April*, 1864, *Cheesman* instituted the first suit for a dissolution of the partnership, and to have the accounts taken.

In .

1865.

CHEESMAN
v.
PRICE.

In *June*, 1864, *Price* filed his bill for a declaration that the partnership had been dissolved on the 21st of *July*, 1863, and for taking the accounts on that footing, and claiming 1,000*l.* for liquidated damages under a clause in the articles, but which was however abandoned at the hearing.

Mr. Selwyn, *Mr. Southgate* and *Mr. Everett* for the Plaintiff. *Parsons v. Hayward* (a); *Kemble v. Farren* (b); *Betts v. Burch* (c).

Mr. Jessel and *Mr. Hemming* for *Price*.

Mr. Selwyn in reply. *Blisset v. Daniel* (d).

The MASTER of the ROLLS.

Dec. 4. The real question in this case is, whether, under the articles of partnership or otherwise, *Mr. Price* was justified in sending the notice, and thereby causing a dissolution of the firm. The principal charges made by *Mr. Price* against *Mr. Cheesman* relate to the accounts kept by him. The charges are, first, that he violated clause 9 of the articles, by endorsing bills on behalf of the partnership; secondly, that he has omitted to enter in his accounts sums received by him; and, thirdly, that he did not remit at once to the firm in *London* the sums received by him in the country, but deducted therefrom his expenses and the sums he was allowed to draw in respect of his share of the profits.

In

(a) 31 *Beav.* 199, and 8 *Jur.*
 924.
 (b) 6 *Bing* 141.

(c) 4 *Hurl. & N.* 506.
 (d) 10 *Hare*, 493.

In order to be able to judge of this matter satisfactorily, I have been compelled to go into the accounts, as well as I could, upon the affidavits, with the help of the ledgers of the firm. I think that the counsel for Mr. *Price* push the construction of the 9th clause of the partnership article too far, when they contend that it was a violation of it for Mr. *Cheesman* to draw a bill upon a customer, to be accepted by that customer for the amount of his account, when the customer was unable or refused to pay the amount due from him in cash, but consented to give a bill for it. It is to be remembered that Mr. *Cheesman* was acting as the collecting partner in the country, and the necessity of sending to *London* to have such a bill drawn, and of having it remitted to him by post, would have occasioned serious delay and some expense, and would, in the end, have resulted in the same conclusion ; while the delay might have occasioned the loss of the opportunity of obtaining the bill, besides the expense of keeping Mr. *Cheesman* at the place where the customer resided for two days, during which time he might have had no more business to transact there. There is a marked difference between drawing a bill, to be accepted by a stranger, for the purpose of enabling the drawer to raise money on it, and drawing a bill, to be accepted by the customer of the firm, for the amount of his account. I think, therefore, the fact of Mr. *Cheesman* having drawn these bills was not a violation of the 9th clause ; but it was essential that the bill should be transmitted at once to the bankers of the firm for the purpose, if not of being negotiated, at least of being presented for payment at maturity, and for taking the necessary proceedings upon it if it was not duly honoured. I do not think, therefore, that much stress ought to be laid upon this circumstance of the bills being drawn by Mr. *Cheesman*.

1865.

 CHEESMAN
 v.
 PRICE.

The

1865.

CHEESMAN
 v.
PRICE.

The charge that Mr. *Cheesman* deducted his expenses and his monthly share of the profits out of the sums received by him, instead of remitting the sums entire to *London*, is, in my opinion, a charge with more substance in it, but not one of so serious a character as would, in my opinion, have justified the steps taken by Mr. *Price*, although it was very desirable, in order that the accounts should be kept clear and distinct, that the regular course should have been adopted.

But the charge that sums were received by Mr. *Cheesman*, which were never entered in the accounts, is one of much more serious character, and one which, in my opinion, affords ample foundation to justify Mr. *Price* in giving notice of dissolution of the 30th *July*, 1863, even independently of the articles of partnership.

I have endeavoured to investigate this matter as well I could. I have been unable entirely to make out the state of the case as to some of the items, but, as to the others, the evidence is strongly inculpatory of the course pursued by Mr. *Cheesman*. In many cases, Mr. *Cheesman* charged himself with having received a less sum than he actually received. In Mr. *Price's* affidavit seventeen instances are given, amounting in the whole to 220*l.* 19*s.* 6*d.*, charged by Mr. *Cheesman* as received by him, while, in fact, he received 230*l.* 9*s.* 6*d.* After a careful examination of the books and the evidence, this appears to me to be proved. It is suggested that the difference, which is but 9*l.* 10*s.*, is either trivial or to be explained by the discount allowed to customers; but the real objection does not lie in the amount, but in the system which it reveals and the want of confidence which one partner must necessarily feel towards another who is capable of thus conducting the accounts. When such irregularities are possible, it
 must

must necessarily be productive of most injurious consequences to the business, particularly errors in sending in accounts to customers, than which nothing I believe is more likely to injure a tradesman. Many attempts are made by Mr. *Cheesman* to explain this, on the ground of discount and the like ; but these attempts, in my opinion, wholly fail, and the irregularity in his accounts is, in my opinion, an established fact, even upon his own shewing. But were it otherwise, nothing can justify the omission to add some statement in the accounts, to explain why it was that the larger sum appearing to be due from the customers was discharged by the payment of the smaller one. This fact would alone, in my opinion, have justified Mr. *Price* in putting an end to the partnership.

The case, however, against him does not rest here ; there are numerous cases of money received by him and wholly omitted from his accounts : and this is established in many cases by his own admission. In his answer, he admits having received 7*l.* and 3*l.* 1*s.*, which he did not account for, and 12*l.* 10*s.*, which he did not account for till six months afterwards. He also admits having received 7*l.* from Mr. *Berridge*, for which he did not account. He tries to explain this, by making it appear that it was subsequently paid as part of a larger and another sum ; but even if this were true, it was highly objectionable. He admits having received 14*l.* 15*s.*, which he did not account for until the customer, in answer to the account sent in to him by the firm, alleged that he had paid it. He admits a similar transaction as to 11*l.* 2*s.* with a customer of the firm ; and he admits having received 2*l.* 12*s.* due, not to the partnership, but to Mr. *Price* before the partnership began, for which he did not account at all. In all these cases, he offers ingenious excuses to explain why the circumstances of

1865.
CHEESMAN
v.
PRICE.

the payment and the receipt escaped his recollection ; but, in truth, no circumstance can excuse a partner for forgetting the receipt of money due to the partnership. If it only occurred once, it would be a very serious error on the part of a partner, but when this failure of memory is so frequent as to become almost systematic, it makes it impossible for any person to act with him in confidence as a partner, or to place any reliance in him or in his accounts. I regret to say that, from the examination I have made of the accounts, I believe that about 90*l.* or something near that sum can be proved to have been received by Mr. *Cheesman*, and either not accounted for at all by him, or not until the customers asserted they were prepared to establish the fact of payment to him. It is obvious that no firm can safely proceed upon such a footing ; and I have no hesitation in saying, upon this ground alone, that Mr. *Price* was perfectly warranted in putting an end to the partnership as soon as he discovered what the state of affairs was. It is due to Mr. *Price* to say that he had previously, over and over again, remonstrated with Mr. *Cheesman* as to the irregular state of his accounts, and the impossibility of trusting to them. I am of opinion, therefore, that the notice of the 30th of *July*, 1863, was a valid notice, and that the partnership between Mr. *Price* and Mr. *Cheesman* was then dissolved, and I will make a declaration to that effect.

The consequences are, that Mr. *Cheesman* cannot, after the 30th *July*, 1863, claim one-third of the profits, but he is entitled to an inquiry as to how much of the capital employed in the business since that time belonged to him, and to a declaration that he is entitled to such a proportion in the net profits, after deducting all expenses, as his share of the capital bore to that of Mr. *Price*.

1865.

LOVEJOY v. CRAFTER.

THE testator had three children by his first wife, namely, *William, Margaret* and *Eliza*. By his second marriage he had five children, consisting of four sons and one daughter, namely, *Warlters, Emma Mary-ann, Edward, Alfred* and *Francis*.

By his will, dated in 1853, the testator bequeathed to his eldest son, *William*, "as a mark of respect, the sum of 20*l*., I having some years since given him leasehold estate in the *Kent Road* as his share of my property."

He then devised a freehold estate to his daughters *Margaret* and *Eliza*.

And he devised all the residue of his real and personal estate to trustees, in trust for his wife for life, and after her death to sell and divide amongst *Sarah Robson* (the daughter of his wife by a former husband) and his children *Warlters, Emma, Edward, Alfred*, and *Francis* "and such other child or children as shall be living at the time of my decease, or shall be born in due time after my decease, share and share alike," the share of *Sarah Robson* to be paid to her separate use. "The share or shares of my daughter or daughters to be considered as vested upon her or them attaining the age of twenty-one or marriage, which shall first happen," for their separate use, "and the shares of my said sons to be considered as vested in them upon their attaining

Dec. 20, 21.
A testator, having made gifts to the three children of his first marriage, gave his residue to his wife for life, with remainder to the five children of his second marriage (by name) "and such other child or children as should be living at the time of his death:" — *Held*, on the context, that the children of the first marriage were not included in the residuary gift.

1865.

LOVEJOY

v.

CRAFTER.

attaining their respective ages of twenty-one years, with benefit of survivorship and accruer."

At the date of his will, the children by the first marriage were all adults ; but those of the second marriage were all infants.

The testator died in 1854, and all the children survived him ; his widow was still living.

The question was, which of the children participated in the residuary estate.

Mr. *Baggallay* and Mr. *Roberts*, for the three children of the first marriage, contended that the words, "and such other child or children as shall be living at the time of my decease," included all the testator's children then living, and that the three children of the first marriage shared in the residuary estate. That it was plain, that, if the second wife had died, the children of any subsequently taken wife would have taken, and, if so, those of the first marriage could not be excluded. That words of exclusion must be precise and certain, and that the circumstance, that persons take under a distinct gift, does not exclude them from coming in under a subsequent gift to a general class.

They cited *Peppin v. Beckford* (a) ; *Barrington v. Tristram* (b) ; *Ex parte The Earl of Ilchester* (c) ; *Urquhart v. Urquhart* (d) ; *Pearce v. Vincent* (e).

Mr.

(a) 3 *Ves.* 570.

(b) 6 *Ves.* 348.

(c) 7 *Ves.* 368.

(d) 13 *Sim.* 613.

(e) 2 *Myl. & K.* 800.

Mr. *Selwyn* and Mr. *Speed* for the purchaser of a share.

1865.

LOVEJOY
v.
CRAFTER.

Mr. *Hobhouse* and Mr. *Walford* for the children of the second marriage. The context shews that the testator did not intend to include the children of his first marriage as legatees of the residue; he had made a distinct provision for them. The words "other child or children" must to some extent be limited, for as they stand they would apply to the children of any other person. The word "*my*" must, at all events, be introduced into the gift. This shews that the gift was not unlimited. The other provisions relating to the residue do not apply to the Plaintiffs, who were adults at the date of the will.

Mr. *Baggallay* in reply.

The MASTER of the ROLLS.

It was well observed that the words "such other child or children" must be restricted, and the question is, whether they are to be restricted to the children which are last mentioned or to all the testator's children. I am of opinion that they are restricted to the children of the second marriage, that they are, as it were, words *ejusdem generis*, and that the same sort of rule is to be applied to them as in those cases where the testator enumerates particular species of personal property, and then adds some general words which the Court holds to be restricted to things similar to those previously enumerated. I am struck with this:—that he specifies by name all the existing persons who were to take, and there can be no reason why, if he had intended the three children by the first marriage to take in conjunction with those

Dec. 21.

1865.

LOVEJOY
v.
CRAFTER.

those of the second marriage, he should not have specified them by name, as well as the five whom he mentioned. He mentions the five and then says, "and such other child or children as shall be living at the time of my decease or shall be born after my decease." I think that means the children of the class last mentioned, and that if he had intended the words "other children" to include the children of the first marriage, he would have specified them by name. The difficulty I have had has arisen from the manner in which he has dealt with the general expression in the subsequent words. He says "the share or shares of my daughter or daughters to be considered as vested upon her or their attaining the age of twenty-one years." Now that is in favour of the view I have already expressed, because by the second marriage he had but one daughter, and if he had intended to include the three daughters of the first marriage it is probable he would not have anticipated there being one daughter, in the singular number, to take. But he goes on to say "and the shares of my said sons to be considered as vested in them upon their attaining their respective ages of twenty-one years," and "in case any of my *children* shall not have attained the age of twenty-one years when their shares shall become divisible, I direct my trustees to invest such shares in the purchase of stock in the public funds, until they shall attain twenty-one years, and upon their attaining that age, or any of my *daughters* marrying, to pay or transfer their shares to them accordingly, and in the meantime to apply the dividends for their maintenance." Now, undoubtedly, the sense seems to be very much extended here, for he not only uses the words "any of my daughters," but "any of my children." Still, having come to the conclusion, on the former part of the will, that he only meant the children of the second marriage, I think I can with propriety say, that these expressions are to be attributed

attributed to the children he had previously spoken of, and that he refers to the class with whom he was dealing. This explains why he anticipated the possibility of their dying before they attained twenty-one and during their infancy.

1865.

 LOVEJOY
 v.
 CRAFTER.

The same observations apply to the subsequent power to the trustees to raise 200*l.* out of the portion of "any of my children" for "such child or children's" advancement. That clause only applies to the children during their infancy, and the three children of the first marriage were not infants at the time, and therefore the clause is not applicable to them. I am of opinion that this also shews that the "other children" were the children of the second marriage.

In re STRAND MUSIC HALL COMPANY
 (LIMITED).

Ex parte EUROPEAN AND AMERICAN FINANCE
 COMPANY (LIMITED).

June 12, 27.

THE *Strand Music Hall Company (Limited)* was incorporated in 1862, and, by the 78th article, the directors were empowered to borrow on mortgage or by bonds limits of their power, it is in equity binding on the company, and this Court will give effect to it.

Whether bonds issued by a public company, in which the names of the obligees are left in blank, are valid, *quære*.

The proper mode of construing any written instrument is to give effect to every part of it, if this be possible, and not to strike out or nullify one clause in a deed, unless it be impossible to reconcile it with another and more express clause in the same deed.

The 78th clause of articles of association limited the power of the directors of borrowing to 10,000*l.*, unless authorized by a "general meeting." By the 35th clause, a "special meeting" might authorize the borrowing of such sums as it thought fit:—*Held*, that the directors might be authorized to borrow beyond 10,000*l.*, either by a general or a special meeting.

Where directors of a public company have entered into an informal agreement, within the

1865.

—
In re
STRAND
MUSIC HALL
COMPANY.

bonds any sum not exceeding 10,000*l.*, unless authorized by a *general meeting* to borrow a larger amount.

By the 35th article the company in *special meeting* might authorize the borrowing of such sums of money as it might think fit.

The directors having borrowed 9,200*l.*, the company, at a *general meeting* held on the 1st of *February*, 1864, empowered the directors to borrow a sum not exceeding 30,000*l.*

On the 7th of *April*, 1864, the *Credit Mobilier Company* lent the *Strand Music Hall Company* 5,000*l.* on the security of 200 bonds of the *Strand Music Hall Company*, 50*l.* each (representing 10,000*l.*), and on the security of the directors. These bonds were issued with the names of the obligees in blank. Eleven of these bonds (5,500*l.*) were sold by the *Credit Mobilier Company*, and the names of the purchasers were then inserted as the obligees in the bonds.

Before the 10th of *October*, 1864, all the interest of the *Credit Mobilier Company* had been transferred to the *European and American Finance Company*, and on the 10th of *October*, 1864, an agreement was duly executed between the *Strand Music Hall Company* of the first part, the six directors of it of the second part, and the *European and American Finance Company* of the third part, whereby the remaining 189 bonds of 50*l.* each, constituting a first charge on all the property of the *Strand Music Hall Company*, were made liable for the payment of 5,000*l.* to the latter company. The price of the other eleven bonds was paid over.

The *Strand Music Hall Company* was ordered to be wound

wound up, and the *European and American Finance Company* claimed to be specialty creditors by virtue of the bond.

1865.

~~~~~  
In re  
STRAND  
MUSIC HALL  
COMPANY.

Mr. *Jessel* and Mr. *E. Romilly* for the *European and American Finance Company*. It will be contended that the resolution of the 1st of *February*, 1864, to increase the borrowing powers of the directors is invalid, by reason of its having been made at a *general*, and not at a *special*, meeting of the shareholders. That is not so, they acted under the power given by the 78th article, and not under the 35th, and these powers are cumulative. Secondly, it is said that the bonds have no validity, because the names of the obligees were omitted; *Taylor v. The Great Indian Peninsular Railway Company (a)*. The answer is, that an implied power was given, by the deed under seal, to insert the names of the obligees. At all events there is an agreement on the part of the *Strand Music Hall Company* to give valid bonds as a security; this agreement the claimants are entitled to have made good in equity.

The agreement of the 10th of *October*, 1862, is a valid equitable contract, and this Court considers that done which has been agreed to be done, and it will give effect to imperfect instruments executed for a valuable consideration. This is laid down clearly by Lord *Redesdale (b)*. He says, "where parties, meaning to create a perfect title, have used an imperfect instrument, a feoffment without livery of seisin; a bargain and sale without enrolment; a surrender of copyhold not presented according to the custom of the manor, Courts of Equity have considered the imperfect instrument as evidence of a contract for making a perfect instrument, and have remedied the defect even against judgment creditors."

Mr.

(a) 4 De G. &amp; Jones, 559.

(b) Page 116.

1865.

~  
In re  
STRAND  
MUSIC HALL  
COMPANY.

Mr. *Baggallay* and Mr. *Lawson* for the official liquidators of the *Strand Music Hall Company*. The acts of the directors were *ultra vires*, and the shareholders are not bound by this transaction. The power of the directors to borrow was limited to 10,000*l.*, and even then they could only exercise it by giving bonds to the extent of the money advanced; they were not justified in giving bonds to the extent of 10,000*l.* to secure a debt of 5,000*l.* Secondly, the bonds, being in blank, were void, for there was no one to whom they were made payable, no obligation to any one, and they could not be altered by the insertion of a name after they had been executed by the obligors. The object was to commit a fraud on the revenue and avoid the transfer stamp. If they be void, the agreement constitutes no charge for the money advanced. Lastly, the 35th article of the association is positive, that the borrowing powers can only be authorized at a *special* meeting of the shareholders, and therefore the excess beyond 10,000*l.* is clearly void. They cited *Peto v. The Brighton, &c. Railway Company* (a); *Re The British Provident Company* (b).

Mr. *Elderton* for the bondholders.

Mr. *Jessel* in reply.

---

*The MASTER of the ROLLS.*

June 27.

In this case, the *European and American Finance Company* claim to be specialty creditors of the *Strand Music Hall Company (Limited)* for two sums, one of 5,000*l.*, together with interest thereon at 10*l. per cent.*  
per

(a) 1 *Hem. & Mil.* 468.

(b) 10 *Jur.* 713.

*per annum* from the 16th of *March*, 1865, and another of 2,700*L.*, together with interest thereon at the same rate from the 17th of *March*, 1865.

1865.  
In re  
STRAND  
MUSIC HALL  
COMPANY.

The first question to be decided is, whether the directors had power to borrow this amount. The second question is, assuming the first question to be decided in favour of the claimants, whether the directors of the *Strand Music Hall Company* have, by the transaction in question, created a valid specialty debt to the amount claimed. There is no question but that the amount was duly advanced to or for the use of the *Strand Music Hall Company*, the question is, whether the claimants are specialty or only simple contract creditors.

The first question is one of construction on the articles of association of the *Strand Music Hall Company*, and it is, whether the directors had power to borrow beyond the sum of 10,000*L.*

The company had, in fact, previously to the transaction in question on this summons, raised 9,200*L.*, and, consequently, if they had no power to raise more than 10,000*L.*, the loan, in respect of which the present claimants seek to be specialty creditors, would have been invalid, except to the amount of 800*L.*

The 78th clause of articles is to be found under the head of "Increase and decrease in capital," and is in these words, "The company in *special meeting*" (which is defined to mean "an extraordinary special general meeting") "may authorize the borrowing of such sum or, sums of money, and on such terms and conditions, as they may think fit; and may also, by the resolution of a *special meeting*, increase the capital of the company by the issue of new shares."

On

1905  
—  
1906  
1907  
1908  
1909  
1910  
1911  
1912  
1913  
1914  
1915  
1916  
1917  
1918  
1919  
1920  
1921  
1922  
1923  
1924  
1925  
1926  
1927  
1928  
1929  
1930  
1931  
1932  
1933  
1934  
1935  
1936  
1937  
1938  
1939  
1940  
1941  
1942  
1943  
1944  
1945  
1946  
1947  
1948  
1949  
1950  
1951  
1952  
1953  
1954  
1955  
1956  
1957  
1958  
1959  
1960  
1961  
1962  
1963  
1964  
1965  
1966  
1967  
1968  
1969  
1970  
1971  
1972  
1973  
1974  
1975  
1976  
1977  
1978  
1979  
1980  
1981  
1982  
1983  
1984  
1985  
1986  
1987  
1988  
1989  
1990  
1991  
1992  
1993  
1994  
1995  
1996  
1997  
1998  
1999  
2000  
2001  
2002  
2003  
2004  
2005  
2006  
2007  
2008  
2009  
2010  
2011  
2012  
2013  
2014  
2015  
2016  
2017  
2018  
2019  
2020  
2021  
2022  
2023  
2024  
2025  
2026  
2027  
2028  
2029  
2030  
2031  
2032  
2033  
2034  
2035  
2036  
2037  
2038  
2039  
2040  
2041  
2042  
2043  
2044  
2045  
2046  
2047  
2048  
2049  
2050  
2051  
2052  
2053  
2054  
2055  
2056  
2057  
2058  
2059  
2060  
2061  
2062  
2063  
2064  
2065  
2066  
2067  
2068  
2069  
2070  
2071  
2072  
2073  
2074  
2075  
2076  
2077  
2078  
2079  
2080  
2081  
2082  
2083  
2084  
2085  
2086  
2087  
2088  
2089  
2090  
2091  
2092  
2093  
2094  
2095  
2096  
2097  
2098  
2099  
2100

In the 21st January 1904 notice was given of a general meeting to be held on the 1st of February following. The general meeting was held accordingly, and a resolution was passed, empowering the directors to borrow a sum not exceeding £10,000 according to clause 72. This was passed, and was recorded and taken on the 5th of that month, when the resolution was carried by a majority of the shareholders of the company.

The resolution, if it required confirmation, has not since been confirmed by any subsequent meeting of the shareholders.

If the matter rested there no question as to the validity of the power to raise money, to the extent of £10,000, could arise. But the fifth clause of the articles is in these words — "The directors may borrow in the name of the company in behalf of the company, such sums of money as they may from time to time think expedient, either by way of mortgage of the whole or any part of the property of the company, or by bonds or debenture notes, or in such other manner as they may deem best, notwithstanding that the aggregate of the moneys so to be so borrowed shall not at any one time exceed £10,000, unless the borrowing of a larger amount shall have been previously authorized by a general meeting, in which case the directors may borrow in such an extent as is so authorized."

This clause, it is submitted, is inconsistent with clause 72, which requires that a special meeting should be called to authorize the borrowing of any sum exceeding £10,000, and that no special meeting having been called for that purpose, the directors had no power to borrow more than £10,000.

On

On referring to the interpretation clause, little assistance is derived therefrom; a "general meeting" is defined to mean an "ordinary general meeting;" an "extraordinary meeting" means an "extraordinary general meeting;" and a "special meeting" to mean an "extraordinary special meeting." It is obvious that these definitions leave the matter exactly where it was.

1865.

  
In re  
STRAND  
MUSIC HALL  
COMPANY.

The proper mode of construing any written instrument is, to give effect to every part of it, if this be possible, and not to strike out or nullify one clause in a deed, unless it be impossible to reconcile it with another and more express clause in the same deed. I think that I must, if possible, give effect to both these clauses in the articles in question; and I also think that this may be done by declaring that by the 78th clause power is given to a general meeting to authorize the directors to borrow a sum exceeding 10,000*l.*, and that by the 35th clause power is also given to a special meeting of the company to authorize the borrowing of such sums of money as the meeting shall think proper. But for the 78th clause, such power could only be exercised by a special meeting; but for the 35th such authority could only be given by a general meeting; but by the combined effect of those two clauses power is given, either to a special meeting or to a general meeting, to raise money; and though this is not very skilfully expressed in the articles before me, there is, in my opinion, no other construction of which these, the clauses in question, are susceptible.

Various other clauses were read and commented upon, but, in truth, they none of them control or modify the effect of either of the clauses in question. There is no clause requiring a subsequent confirmation  
of

1865.

*In re*  
STRAND  
MUSIC HALL  
COMPANY.

of such a resolution, and no such confirmation was, in my opinion, essential to its validity.

The next question is, have the directors, by what has taken place, created a valid specialty debt of the company, and to what extent. The way in which they endeavoured to accomplish this was as follows:—On the 7th April, 1864, a deed was executed by the *Strand Music Hall Company* of the first part, the chairman and five other directors (by name) of the second part, and the *Credit Mobilier Company* of the third part. By this deed, the *Credit Mobilier Company* agreed to advance 5,000*l.* to the company for six months, with interest at 10*l. per cent. per annum*, on the security of 200 mortgage bonds of the company for 50*l.* each, and, secondly, on two joint and several promissory notes of the six directors for 2,500*l.* The validity of these bonds is disputed, first, because the name of the obligee is not stated in the bonds, and, secondly, because it is contended that it was *ultra vires* to issue bonds for 10,000*l.* as a security for only 5,000*l.* advanced.

Eleven of the bonds, so deposited, were sold by the *Credit Mobilier Company*, and on the sale, the name of the purchaser was inserted as the obligee in the bond.

In October, 1864, the *Credit Mobilier Company* required, if they continued their loan, certain conditions and a bonus of 400*l.*, which were accepted, with a modification, by the directors of the *Strand Music Hall Company*. This new plan was carried into execution by an agreement of 10th October, 1864, duly made and executed by and between the *Strand Music Hall Company* of the first part, the same six directors of the second part, and the *European and American Finance Company* of the third part. It was agreed, that the agreement

agreement of 7th *April*, 1864, with the *Credit Mobilier Company* should be renewed and confirmed between the parties to the said agreement.

1865.  
In re  
STRAND  
MUSIC HALL  
COMPANY.

1stly. That the loan was to be for six months from the date of the agreement, with interest at 10*l. per cent. per annum* together with a bonus of 400*l.*, and commission of 3*l. 10s. per cent.* on sale of shares hereinafter mentioned.

2ndly. The deposit by the *Strand Music Hall Company* of 189 mortgage bonds of 50*l.* each, representing 9,450*l.*, and forming part of 25,000*l.* mortgage bonds, constituting a first charge on all the property of the *Strand Music Hall Company*, with the *Credit Mobilier Company* by way of collateral security; and

3rdly. Two joint and several promissory notes for 2,500*l.* each, by the said directors; and if the notes should not be paid at maturity, it should be lawful for the *European and American Finance Corporation* to sell the mortgage bonds, and out of the proceeds pay themselves the 5,000*l.*, with interest and all the costs, together with a commission of 3*l. 10s. per cent.* on the amount of such sale.

The first point to be considered is, whether this transaction creates a valid charge on the property of the company, for the sum of 5,000*l.* Although there be considerable informality in the instrument itself and in the bonds given, still, I am of opinion that this creates a valid charge upon the property of the company. Assuming that I am right in the first point, and that the *Strand Music Hall Company* had the power to raise this money, and consequently to give a valid charge upon their property, I am of opinion that they have endeavoured to do so, and that the deed executed



1865.  
  
*In re*  
**STRAND**  
**MUSIC HALL**  
**COMPANY.**

being for valuable consideration, they have effected that object. I think this rests upon the principle of the cases insisted upon by counsel, and referred to in the passages cited to me from Lord *Redesdale's* book. The *Strand Music Hall Company* has, in this instance, by contract for value, given a right to the *Credit Mobilier Company*, and through them by transfer and also directly to the *European and American Finance Company*, to obtain a valid charge on all their property. If this instrument be incomplete at law, this Court will interfere to carry the contract into execution, and complete and make effectual the object of both parties. If the *Strand Music Hall Company* had proved a flourishing concern, and had refused to complete this agreement, this Court would, on a bill filed for that purpose, have compelled them to do so. The rights in equity are, in my opinion, complete when the agreements were executed, and the fact that the company has failed, instead of becoming prosperous, cannot affect this right. I think, therefore, that a valid mortgage in equity on the whole of the property of the *Strand Music Hall Company*, for the sum of 5,000*l.*, was effected.

On the question of the frame of the bonds, I give no opinion as to their validity; but I am disposed to think, that the suggestion of an implied authority having been given to the holder of the bonds to insert, on behalf of the *Strand Music Hall Company*, the name of the obligee, is not sufficient to render them valid.

The objection that the bonds to the nominal value of 10,000*l.* were given to secure 5,000*l.* has not, in my opinion, any weight. It is frequently, and indeed usually, the case, that the property pledged exceeds the value of the charge; but this does not render the trans-  
 action

action invalid, independently of there being some limitation of authority in the power which they profess to exercise. On turning to this authority, I do not see anything in the articles of their association to limit this authority, or to make the case of this company, or of the directors of it, different in this respect from that of any ordinary individual. I am, therefore, of opinion that the *European and American Finance Company* have a valid charge on the property of the *Strand Music Hall Company* to the extent of the 5,000*l.* advanced by them.

1865.  
  
*In re*  
 STRAND  
 MUSIC HALL  
 COMPANY.

---

NOTE.—Affirmed by the Lords Justices the 3rd of August, 1865.

---

*Re* FOX'S WILL.

THE testator gave "all his goods and effects to his widow *Esther Fox*, *durante viduitate*, and afterwards to his sister *Elizabeth Allen* for life." He then proceeded thus:—"And it is my mind and will that after the death of my sister *Elizabeth Allen*, the residuary effects shall go to my surviving brothers and sister and their children, to be divided equally between them."

July 22, 24.  
 Under a bequest to two successively for life, with remainder to the survivors of a class:—*Held*, that the survivorship had reference to the death of the last tenant for life.

The testator died in 1795, he left his widow and three brothers and a sister surviving him.

His sister *Elizabeth Allen* died in 1810, and the widow in 1859.

The three brothers and the sister of the testator died in the interval between the death of the sister and that of

1865.

Re  
Fox's Will.

the widow; two of them had children, some of whom were still living.

The question was, who, under the above gift, were now entitled to the testator's residuary estate, which had been paid into Court under the Trustee Relief Act.

Mr. *Edward F. Smith*, for the Petitioners, argued, that all the brothers and sisters who survived the testator (except *Elizabeth*) shared in the residue. He referred to *Shailer v. Groves* (a), where the gift in remainder is stated to be to the "surviving brothers and sisters or their issue;" *Jurman on Wills* (b); *Evans v. Evans* (c); *Kidd v. North* (d).

Mr. *E. Romilly*, Mr. *C. E. Fox* and Mr. *Forbes*, for the Respondents, argued *contra*, that the survivorship had reference to the death of the widow, the last tenant for life; *Atkinson v. Bartrum* (e); and secondly, that the word "surviving" did not apply to the "children."

---

*The MASTER of the ROLLS.*

I am of opinion that this case is very nearly met by *Atkinson v. Bartrum* (e), which authority has been supported by the House of Lords. I think that the word "surviving" applies to the whole class of parents and children, and that the period of division was the death

(a) 6 *Hare*, 162, and see 11  
*Jur.* 485, and 16 *L. J. (Ch.)*  
367.  
(b) 2nd edit. p. 69.

(c) 25 *Beav.* 81.  
(d) 3 *De G., M. & G.* p. 951.  
(e) 28 *Beav.* 219.

death of the last tenant for life, when the class was to be ascertained. The class consists of the brothers and sisters of the testator, and their children; and these three divisions constituted the class. To entitle any of them to take, they must survive the period of distribution, and, I think, they take *per capita*, and not *per stirpes*. The result is this:—as the sister did not survive the widow, the death of the widow is the period at which the survivorship is to be ascertained.

1865.  
Re  
Fox's Will.

This is consistent with *Shailer v. Groves*; for if the word used by the testator in that case was “or,” as reported in the *Law Journal* and the *Jurist*, and not “and,” as reported in the 4th volume of *Hare*, still, as the brothers and sisters all died in the lifetime of the widow, the result was the same, and it made the expression substantially “and.”

Take a declaration that the residuary personal estate is divisible *per capita* equally among such of any of the brothers and sister of the testator (other than *Elizabeth Allen*) as survived his widow, and such children as survived her of any brother and sister of the testator(a).

(a) *Reg. Lib.* 1865, *A. Fol.* 1932.

---

NOTE.—See *Knight v. Poole*, 32 *Beav.* 548; *Drakeford v. Drakeford*, 33 *Beav.* 43.

---

10  
000

Summary

The following information was obtained from the investigation of the case of the missing person, [Name], who was last seen on [Date] at [Location]. The investigation was conducted by [Name] and [Name] on [Date]. The results of the investigation are as follows:

[Name] was last seen on [Date] at [Location]. He was wearing a [Description of Clothing]. He was accompanied by [Name] and [Name]. They were walking towards [Location] when [Name] disappeared.

[Name] was last seen on [Date] at [Location]. He was wearing a [Description of Clothing]. He was accompanied by [Name] and [Name]. They were walking towards [Location] when [Name] disappeared.

[Name] was last seen on [Date] at [Location]. He was wearing a [Description of Clothing]. He was accompanied by [Name] and [Name]. They were walking towards [Location] when [Name] disappeared.

The following information was obtained from the investigation of the case of the missing person, [Name], who was last seen on [Date] at [Location]. The investigation was conducted by [Name] and [Name] on [Date]. The results of the investigation are as follows:

On [Date] at [Location]

For Service of the Court

I, [Name], the undersigned, being a duly qualified and sworn officer of the Court, do hereby certify that the foregoing is a true and correct copy of the investigation of the case of the missing person, [Name], who was last seen on [Date] at [Location].

Although I signed this report, I think that the facts are as stated.

1865.

## FORRER v. NASH.

July 12, 13,  
15.

BY an agreement, dated the 2nd of *September*, 1864, the Plaintiff agreed to let to the Defendant the ground floor, &c. of No. 2, *Hanover Street* "from *Michaelmas-day*, 1864, with the right to a lease of the above-named premises, for seven, fourteen or *twenty-one years*;" also with the right to re-let the premises, if he desired it, for any business that would not interfere with Mr. *Forrer's* business.

It turned out, afterwards, that Mr. *Forrer*, the Plaintiff, was himself a mere lessee of the property for a term, of which twenty and a-quarter years only remained unexpired. It also appeared that his lease contained covenants restraining the carrying on, upon the premises, any trade or business except that of jeweller, and from underletting the premises without the consent of his landlord.

This being discovered, a correspondence ensued between the solicitors of the parties, and on the 22nd of *September*, the Plaintiff's solicitors having written a letter calling on the Defendant to perform his agreement, the Defendant's solicitors replied, on the same day, remarking that the Plaintiff had not the power to carry out the agreement, and adverting to the deficiency of the term and to the restriction against underletting the premises. They added, "unless some communication

Where a person sells property which he is neither able to convey or to enforce a conveyance from other proper parties, the purchaser may repudiate the contract, and is not bound to wait to see if the vendor can induce some third person to join in making a good title.

The Plaintiff agreed to grant to the Defendant a lease for twenty-one years, with a right to re-let; but he had only a term of twenty years, and could not underlet without the consent of his landlord. The Defendant repudiated the contract. The Plaintiff afterwards filed his bill for specific performance,

and, pending the suit, the landlord agreed to concur:—*Held*, that the contract could not be enforced, and the bill was dismissed with costs.

1865.  
FORREER  
v.  
NASH.

from you, in the course of tomorrow should alter our views, *we shall consider the whole negotiation at an end.*"

The Plaintiff's solicitors rejoined, insisting on the contract, and on the 23rd of *September* the Defendant's solicitors replied, adhering to the former letter of the 22nd of *September*, and declining any further negotiation.

The Plaintiff, on the 7th of *October*, 1864, (before he had obtained the concurrence of his landlord in granting the lease which the Plaintiff had agreed to grant,) filed his bill for the specific performance of the contract of the 2nd of *September*, 1864.

It appeared that so late as *January*, 1865, the landlord had refused to join in the lease to the Defendant; but, in *April*, 1865, the landlord made an affidavit, in which he stated, that he had been and was ready to do all acts necessary for enabling the Plaintiff to perform, in all respects, on his part, the agreement with the Defendant.

Mr. *Southgate* and Mr. *E. K. Karslake* for the Plaintiff. The contract is complete and binding, and the Plaintiff, who has now the power of performing it, is entitled to a specific performance. It is no objection, to a suit for the specific performance of a contract, that the title has been made perfect since the institution of the suit; it is frequently made perfect even after decree.

Mr. *Selwyn* and Mr. *Eddis* for the Defendant. First, there was no concluded agreement between the parties; secondly, the Plaintiff had no power to perform the contract at the time when the Defendant annulled the contract, which he was entitled to do, and nothing subsequent

sequent can reinstate it. Time was of the essence of the contract, for the Defendant intended to devote the premises to his business purposes, which admitted of no delay and required the immediate possession of the premises.

1865.

FORRER  
v.  
NASH.

---

*The MASTER of the ROLLS.*

In this case, I am of opinion that the contract was perfectly good, and that it is well proved; but, under the circumstances, I am of opinion that the Plaintiff is not entitled to a decree for specific performance. The contract was for a lease for twenty-one years, with the right to relet the premises; but the Plaintiff had only the power to grant a lease for about twenty years, and the assent of Mr. *Leslie*, the freeholder, was required to enable the Plaintiff to grant a lease for twenty-one years. In addition to this, the covenant in the Plaintiff's lease made it impossible for him to grant to the Defendant a "right to relet the premises for any business which would not interfere with" the Plaintiff's business; the assent of the freeholder was also necessary for that purpose. As soon as the Defendant found that the Plaintiff had no power to grant the lease for which he contracted, his solicitor wrote, requiring the assent of the landlord, and pointing out that the Plaintiff had not the power to perform his agreement.—[*The MASTER of the ROLLS* commented on the subsequent correspondence, and continued:—It is important to observe, that, during this time, the Plaintiff had no power to grant the lease, and therefore the case was like that of a person undertaking to sell a property which does not belong to him. It appears, from the correspondence, that the Defendant set the Plaintiff at defiance in the month of *September*, 1864. It is also to be observed that

*July 15.*



1863.  
 ~~~~~  
 ~~~~~  
 ~~~~~  
 ~~~~~  
 ~~~~~

that the shop was wanted by the Defendant for the purpose of carrying on his trade, he being desirous of ~~acquiring~~ ^{acquiring} in his connection: and if he had taken possession of the premises, he might have been turned out by the court at any time if he thought fit to dissent from the lease granted, and besides the Defendant could not have had the lease for the full term with the power to re-let, which he had contracted for.

The Plaintiff at the hearing, says, I have now the power to grant you the lease, and for that purpose he produces an affidavit from Mr. Leake, filed the 21st of April, 1865, in which he says, he is ready to do all acts necessary to enable the Plaintiff to fulfil his contract. If he had made this statement in September, 1864, and the Plaintiff had communicated it to the Defendant, there would have been an end of the question. But how long was the Defendant to go on and wait to know whether the Plaintiff could make out a good title? The Plaintiff, it appears, had several interviews with the Mr. Leake, the respondent, and it is not contradicted that in January of the present year the Plaintiff could not make a title, or, at that time, Mr. Leake refused to join in the lease, and it was not until April of the present year that he consents to do so. How long was this to go on?

The Plaintiff filed his bill in December, 1864, and it is proved, that in January, 1865, he was not able to grant the lease he had agreed to grant, and he does not shew that he was ever able to complete his contract until April, 1865. Is a person entitled to keep another in suspense during that time? If so, it may go on any length of time.

Besides this, it is to be observed that there was no mutuality,

mutuality, for the Defendant could not have had a decree against the Plaintiff to perform the contract, because the Court does not attempt to compel a person to do what is impossible. The Plaintiff had no power to grant the lease, and neither the Court nor the Defendant could have compelled him to do so.

1865.

FORREK
v.
NASH.

I am of opinion that when a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say, "I will have nothing to do with it." The purchaser is not bound to wait to see whether the vendor can induce some third person (who has the power) to join in making a good title to the property sold.

The bill must be dismissed with costs.

WARD v. CARTTAR.

Nov. 21, 23.

THE question in this case arose upon the Statute of Limitations (3 & 4 Will. 4, c. 27, ss. 2, 28), under the following circumstances:—

In 1828, the testator mortgaged a freehold house in *Greenwich* to *Matthews* and *Pearson* for a term of 1,000 years for securing the sum of 40*l*.

The testator died in 1829, having devised this property to his wife for life, with remainder to his sons, daughters and granddaughters.

A solicitor paying off a mortgage on his client's estate is considered as acting as his agent.

A mortgagee out of possession called on the tenant for his rent, who said he had laid it out in repairs. The mortgagee acquiesced in this; but there

The

was no evidence of the tenant's accepting the mortgagee as his landlord or of anything like an attornment:—*Held*, that there was not an entering into possession or into the receipt of the rent by the mortgagee.

1865.
WARD
v.
CARTTAR.

The widow died in *April*, 1836, and, in the same year, Mr. *Carttar* was employed as solicitor of the legatees. An attempt was made, through him, to sell the house for the purpose of division, but without success. In *August*, 1836, *Carttar* paid off the mortgagees (*Matthews* and *Pearson*), but took no assignment of the mortgage. He continued to receive the rents down to 1841, when he became bankrupt. The bankruptcy was annulled, and in *January*, 1843, *Carttar* assigned all his estate to trustees, of whom *Pugh* was the survivor, for distribution amongst his creditors. Subsequently, in *September*, 1843, the trustees obtained an assignment of the mortgage from *Matthews* and *Pearson*. They thereupon insured the house against fire, and applied to the tenant in possession for the rent in arrear. The tenant accounted for it, by saying that he had laid it out in repairs, and the trustees acquiesced in this, and at that time received nothing from the tenant. The first time they received any rent was on the 24th of *September*, 1844, and they had since continued in receipt of the rent. There was no proof of any attornment by the tenant to the trustees or any acknowledgment of their title as his landlord prior to the payment of the rent on the 24th of *September*, 1844.

This bill was filed in *January*, 1864, by the persons entitled in remainder under the will of the testator, against *Carttar* and *Pugh* to redeem the mortgage.

Carttar disclaimed, and *Pugh*, though admitting he had received sufficient to discharge the mortgage, insisted on the Statute of Limitations (3 & 4 Will. 4, c. 27) in bar.

Mr. *Southgate* and Mr. *W. W. Cooper* for the Plaintiffs. The statute does not apply in this case, for *Carttar*

was

was never in possession in his own right, he was in as the mere agent for the Plaintiffs, and he never changed his character. In regard to *Pugh*, he was never in personal possession, except by the receipt of rent, and the first rent received by him was paid on the 24th of *September*, 1844, which is less than twenty years before the filing of the bill. Neither the payment of insurance nor the demand of rent is a possession or receipt of rents required by the statute. The Defendant has been more than paid the 40*l.* and interest, but we waive all these accounts, and ask a conveyance with costs.

1865.

 WARD
 v.
 CARTTAR.

Mr. *Hobhouse* and Mr. *G. N. Colt* for *Pugh. Carttar*, from the time he paid the mortgage, was in receipt of the rents in the character of mortgagee, and not as agent, and there is no proof of his accounting to the Plaintiffs for the rents. He continued in possession until *Pugh* entered, for otherwise the possession was vacant. More than twenty years before the filing of the bill, *Pugh* called on the tenant for his rent; the tenant accounted, and the amount was allowed by *Pugh* to the tenant for repairs. This was an acknowledgment of his title and equivalent to the payment of the rent itself. The possession of the tenant was that of the landlord, and, by this attornment to *Pugh*, he entered into possession.

Mr. *Bilton*, for *Carttar*, asked for costs.

Mr. *Southgate* in reply.

The MASTER of the ROLLS.

This is a bill for redemption, and the defence set up is twenty years adverse possession by a mortgagee in possession.

Nov. 23.

1865.
WARD
v.
CARTTAR.

session. The subject of the suit is a house called No. 9, *Union Street, Greenwich*, which was mortgaged by the testator, on the 16th of *March*, 1828, to *Matthews* and *Pearson* for a sum of 40*l.* Shortly after this, in 1829, the testator died; he left the whole of this property to his wife for life, and after her death to his four sons, two daughters and a granddaughter.

The widow died in *April*, 1836.

For a considerable time after the death of the testator, *Carttar* was the solicitor of the family, and he received the rents of this house, which, it appears, was never in the possession of *Matthews* and *Pearson*, the mortgagees. In *August*, 1836, *Carttar* paid *Matthews* and *Pearson* the 40*l.*, but he took no assignment, and there the matter rested. It is material to consider what, at that time, was the effect of these transactions. I am of opinion that *Carttar* must be considered as the agent of the legatees, and not as taking the mortgage for himself. There was an account between him and his clients; he had received rents and done work and labour for them, and if the account had then been taken, I should have taken it against him as an agent, and not as a mortgagee in possession and making him account for the rents which, without his wilful default, he might have received. It is impossible to say, that if my solicitor pays off a mortgage on my property, either with or without my instructions, he can alter the character in which he acted and consider that he has become a mortgagee in possession. I am clear that, in such a case, I should take the account against the solicitor as the agent of his client, charging him with his receipts, but not with wilful default, as I should against a mortgagee in possession, if the house had not been properly
let

let by him. I am of opinion that, after the payment to *Matthews* and *Pearson*, the possession was the possession of *Carttar's* clients.

1865.

WARD

v.

CARTTAR.

In 1841 *Carttar* became bankrupt, and then, for a time, no rents were received by anyone; but I am of opinion that his bankruptcy did not alter the possession, which was still the possession of the legatees, the clients of *Carttar*, and that it continued such until some adverse possession was taken.

In *January*, 1843, *Carttar* assigned his property to *Pugh* and another (of whom *Pugh* is the survivor) in trust for distribution amongst his creditors, and in *September*, 1843, they took an assignment of this house, No. 9, *Union Street*, from *Matthews* and *Pearson*. It is necessary to pause here and observe, that this was more than twenty years before the bill was filed. I am disposed to think, that if the account between *Carttar* and his clients had then been such, that nothing was due to him, he could not have taken an assignment from *Matthews* and *Pearson* for his own benefit, but that he would have been a trustee for the Plaintiffs, his clients, and no question on the statute could then have arisen, for *Pugh* and his co-trustee could not stand in a better situation than *Carttar* did. It would therefore have been impossible to decide the question, without ascertaining the state of the accounts between *Carttar* and his clients.

But assuming that *Carttar* was a creditor of the legatees at that time, and that a balance was due to him, I am still of opinion, on the evidence, that possession was not taken by *Pugh* until *September*, 1844. What the Defendant *Pugh* relies on is, first, that in *April*, 1843,
he

1865.
~
WARD
v.
CARTER.

he effected an insurance against fire ; but this amounts to nothing. A mortgagee out of possession may effect an insurance, but that is not taking possession, and the payment can only form an item of allowance in the account.

Secondly, it is admitted that no rent was actually received until the 24th of *September*, 1844, which is less than twenty years before this bill was filed, which was in *January*, 1864. It appears that before *September* an application was made by *Pugh* and his co-trustee to the tenant in possession for the rent, and the tenant answered it by saying, that he had laid it out in repairs, and that the trustees acquiesced in this. This is very doubtful and ambiguous, and there is no evidence that the tenant said, " I accept you as landlord," or did anything that amounted to an attornment. There is only a statement that the trustees made some inquiry about the rents, but that they received nothing. In the absence of further evidence, possession can only be considered to have been taken at the time when the rent was first received, and the first money which was actually received by the trustees was on the 24th of *September*, 1844, which is less than twenty years before this bill was filed.

The Plaintiffs are entitled to redeem, I must order an assignment, and *Pugh* must pay the Plaintiffs' costs.

1865.

BAILLIE v. M'KEWAN.

Nov. 3.
Dec. 8.

IN *July*, 1861, by the settlement made on the marriage of the Plaintiffs (Mr. and Mrs. *John Baillie*), some *East India* Stock and some £3 per Cents and Railway Stock, which had been transferred into the name of Dr. *James Baillie*, as sole trustee, were settled upon the Plaintiffs and their children on the ordinary trusts.

Shortly after this, in the month of *November*, 1861, Dr. *James Baillie* suggested to the Plaintiffs the expediency of laying out 2,100*l.* (part of the trust property) in the purchase of a leasehold house, No. 9, *Westbourne Square*, which, as he alleged, belonged to him. Mr. and Mrs. *Baillie* seemed to have trusted to this representation, without making any further inquiry as to the value of the house. They assented to this disposition of the trust funds, and gave the authority required by the settlement for the change of the investment.

A. B., in whom a lease was vested, deposited it with his bankers by way of equitable mortgage. The bankers afterwards received notice (as the fact was) that *A. B.* was a mere trustee of the leasehold, but they subsequently obtained from him a formal mortgage of the legal estate. *Held*, that the *cestuis que trust* had priority over the bankers.

On the 20th of *December*, 1861, Dr. *James Baillie*, who had previously been only negotiating for the purchase, obtained a conveyance of the house to himself in consideration of 900*l.*; but the deed did not, on the face of it, shew that it was to be held on any trusts whatever. Two days previously to the conveyance, he had sold out 700*l.* New £3 per Cents (part of the trust funds), which produced 630*l.*, and this sum he applied in part discharge of the purchase-money. In *January*, 1862, he sold out 800*l.* *East India* Stock, and later in the same year he sold out and misappropriated a further portion of the trust funds.

1865.
~
BAILLIE
v.
M'KEWAN.

About *Christmas*, 1861, Mr. and Mrs. *Baillie* sent the whole of their furniture to the house, but they did not actually go to reside there until *November*, 1862. But the Court came to the conclusion, that they took possession at *Christmas*, 1861, though it was alleged that the trustee continued to reside there.

On the 25th *February*, 1862, Dr. *James Baillie* deposited the lease with the *London and County Bank*, as a security for 1,500*l.* and the floating balance of his banking account, and the documents of title relating to the house were also, at the same time, deposited with the bank. Dr. *James Baillie*, at the same time, signed a written undertaking to execute to the bank, when required, a valid legal mortgage. The banking company, however, made no inquiry as to the ownership or possession of the house.

Mr. and Mr. *Baillie*, having discovered that Dr. *James Baillie* had misapplied the trust funds, instituted a suit (*Baillie v. Baillie*) against him, on the 10th of *January*, 1863, and, on the same day, obtained an injunction to restrain him from parting with the railway stock, the only residue of the trust funds. Three days previously (7th *January*, 1863) Mr. *Waley*, a stock broker, on behalf of the Plaintiffs, informed Mr. *Gray*, the accountant of the bank, that the trustee had applied the trust funds to his own purposes, but he said nothing of the leasehold property.

On the 14th of *January*, 1863, Mr. *Jennings*, the clerk of the Plaintiffs' solicitor, called on Mr. *Stevens*, the solicitor of the bank, to whom he had been referred, and, amongst other things, delivered to him a copy of the bill in *Baillie v. Baillie*. This, as the Court held, gave "full knowledge of the nature and extent of the claim

claim made by the Plaintiffs to this house, and the facts which they alleged in support of it."

1865.

BAILLIE

v.

M'KEWAN.

On the 16th of *January*, 1863, Dr. *James Baillie* executed a legal mortgage of the house to the trustees of the bank.

The bank, on the 17th of *March*, commenced an action-at-law against the Plaintiff, Mr. *Baillie*, for the use and occupation of the house, and, in *April*, 1864, the Plaintiffs instituted this suit against the public officer and trustees of the bank, to obtain a declaration of the invalidity of their mortgage.

Mr. *Baggallay* and Mr. *C. Parke* for the Plaintiffs. First, as between the *cestui que trust* and the bank, in respect of its equitable mortgage, the Plaintiffs' rights must prevail; for the equitable mortgagees could only acquire the interest of the trustee. Secondly, the bank obtained the legal estate, with knowledge of the Plaintiffs' rights, and by a breach of trust. They had constructive notice of every equity of the Plaintiffs, the house being then in their occupation. They had also actual notice from the bill in *Baillie v. Baillie*. They cited *Jones v. Smith* (a); *Knight v. Bowyer* (b); *Manningford v. Toleman* (c); *Daniel v. Davison* (d); *Carter v. Carter* (e); *Allen v. Knight* (f); *Willoughby v. Willoughby* (g); *Moore v. Jervis* (h).

Mr. *Selwyn* and Mr. *Surrage* for the bank. The Plaintiffs have no interest in this house under any contract or agreement; having failed in the other suit to get

(a) 1 *Hare*, 60.

(b) 23 *Beav.* 640.

(c) 1 *Coll.* 670.

(d) 16 *Ves.* 249.

(e) 3 *Kay & J.* 617.

(f) 5 *Hare*, 272.

(g) 1 *Term Rep.* 763.

(h) 2 *Coll.* 60.

1855.
 ~~~~~  
 BAKER  
 v.  
 M'KEWAN.

THE TRUSTEES, THEY NOW WERE FOUND and claim the house.  
 It is a mere attempt to follow the trust money without  
 enjoining it.

The bank had obtained a valid equitable mortgage  
 before, it is even alleged, they had notice of any trust.  
 They were purchasers for valuable consideration without  
 notice, and were entitled, at any time, to protect them-  
 selves by getting in the legal estate.

The cases of notice by the possession of a tenant  
 are inapplicable to this case. The Plaintiffs, according  
 to their own representation, were the equitable owners,  
 and the trustee himself was actually in possession. The  
 Plaintiffs have been guilty of gross negligence in not  
 seeing that notice of the trusts was indorsed on the  
 deed, and they are not entitled to the assistance of  
 the Court as against innocent parties. They cited  
*Colyer v. Finch* (a); *Rice v. Rice* (b); *Evans v. Bick-  
 nell* (c); *Kennedy v. Green* (d); *Perry-Herrick v.  
 Attwood* (c).

Mr. Baggallay in reply.

---

*The MASTER of the ROLLS.*

*Dec. 8.* The question which arises in this case is, whether the  
*London and County Banking Company*, represented by  
 the Defendant Mr. M'Kewan, their public officer, have  
 a valid mortgage in the house No. 9, *Westbourne Square*,  
 as against the Plaintiffs. This mortgage, the Plaintiffs  
 allege, was made after the house had been sold to their  
 trustee, Dr. James Baillie, in trust for them.

It

(a) 19 *Beav.* 500; 20 *Beav.*  
 555, and 5 *H. of L. Cas.* 905.  
 (b) 2 *Drew.* 73.

(c) 6 *Ves.* 174.  
 (d) 3 *M. & K.* 699.  
 (e) 25 *Beav.* 205.

It was, in my opinion, an important matter for consideration, in this case, in whose occupation the house was in *February*, 1862, when the lease of it was deposited by Dr. *Baillie* with the banking company. It was not until *November*, 1862, that the Plaintiffs Mr. and Mrs. *Baillie* went to reside there, but at *Christmas*, 1861, they sent the whole of their furniture to the house, with which it was then, and has subsequently remained, fitted up. This is distinctly proved, and I think that this was virtually a taking possession of the house by the Plaintiffs, and that Dr. *James Baillie* (if he lived in the house, which, though doubtful upon the evidence, I assume to be the case) did so only as the agent of the Plaintiffs. In my opinion, the relation of the trustee and *cestui que trust*, as regards this house, was then established between them, and that Dr. *James Baillie*, while residing in the house and superintending the alterations, was only acting as their agent, and that, if no further incident has occurred, he would have been unable successfully to contend that he was not the trustee of this house.

On the 25th *February*, 1862, following, the lease was deposited by Dr. *James Baillie* with the bank as a security for 1,500*l.* and the floating balance of his banking account, and the documents of title relating to the house were also deposited at the same time.

The question is, whether this gave the banking company a right to enforce this security against the Plaintiffs? I think that it did not. If Dr. *James Baillie* had no interest in the house, it is, in my opinion, established, both by principle and authority, that he could not, by depositing the deeds of property belonging to another, create in that depositee an interest which he did not himself possess. Upon the evidence before me and to  
which

1865.

BAILLIE  
v.  
M'KEWAN.

1865.  
Baillie  
v.  
McKewan.

which I have referred, I think that the equitable interest in the lease of the house No. 9 was vested in the Plaintiffs, and I find no evidence on the part of the Defendant to contradict or affect this testimony on behalf of the Plaintiffs.

It is also to be observed, that no further conveyance could have been made to the Plaintiffs; the property had been assigned to Dr. *James Baillie* alone, and, on the assumption of his having no beneficial interest in the house, all that he need or ought to have done was, to have executed a declaration of trust of the house in favor of the Plaintiffs and their children, according to the trusts of the marriage settlement.

It is also to be observed, which is a material circumstance, that the banking company made no inquiry, either directly or through their solicitors, as to the ownership or the possession of the house, which, if it had been made, would, in all probability, have disclosed the whole truth; but they took the deeds for what they were worth, that is, as a security for the repayment of the debt then and thereafter to become due to them from Dr. *James Baillie*. They took, without inquiry, an equitable mortgage of his interest in No. 9, *Westbourne Square*; but, if I am right, his interest in that house was nothing, and, accordingly, this security was nothing.

If this view of the case be correct, it disposes of the whole matter; but the subsequent events, which are much relied upon by the banking company, must be referred to, although they do not, in my opinion, mend their case.

On the 14th *January*, Mr. *Jennings* served a copy  
of

of the bill in *Baillie v. Baillie* on Mr. *Stevens*, the solicitor of the company. Two days after this, and, probably, in consequence of the general information respecting Dr. *James Baillie* obtained in the interval by the company, they obtained a legal mortgage of the house in question from Dr. *James Baillie*, which, as I collect from the evidence, was prepared and the execution thereof by Dr. *Baillie* obtained by Messrs. *Wilkinson, Stevens & Co.*, the solicitors of the bank, after they had received a copy of the bill in *Baillie v. Baillie*, and, therefore, after they had full knowledge of the value and extent of the claim made by the Plaintiffs to the house, and also of the facts they alleged in support of it.

It is obvious, that the obtaining the legal estate by the banking company, after this full notice to their solicitors, cannot improve their equity or give them any better security than they possessed before it.

This is one of those distressing cases in which the question is, which of two innocent persons is to bear the loss occasioned by the misconduct of the third. There has been, undoubtedly, much negligence on both sides; on the part of the Plaintiffs, in allowing all the property settled on their marriage to be transferred into the name of a single trustee, which, however respectable he may be, ought never to be permitted, and, on the part of the company, when the lease and deeds relating to the house were proposed to be deposited, in not making proper inquiries for the purpose of ascertaining who was in possession of the house, and in what character. But I am of opinion, that the imprudence of the Plaintiffs, in having a single trustee of their settled property, is not sufficient to deprive them of their property, or to enable their trustee to dispose of it as his own. In my opinion, the conveyance of the house of the 20th of  
*December,*

1865.

BAILLIE  
 v.  
 M'KEWAN.

1865.  
BAILLIE  
v.  
M'KEWAN.

December, 1861, made to Dr. *James Baillie*, must, in the circumstances of this case, be considered as having been made to him in his character of trustee for the Plaintiffs, as it was subsequent to the arrangement made between him and his *cestuis que trust*, which was, that the trust property should be employed in purchasing the house, and, in fact, the trust property was actually so employed.

In this state of circumstances, in my opinion, the assignment to him could not be taken by him in any other character than that of trustee, and this relation being then created, it was not in the power of Dr. *James Baillie* to mortgage the property which did not belong to him to the company.

I am of opinion, that the Plaintiffs are entitled to the decree they ask against the banking company, who must reconvey the legal estate in the house No. 9, *Westbourne Square*, to the new trustee, upon the trusts of the settlement.

The costs must follow the event, including the costs of the action.

---

NOTE.—See *Primmer v. Rye*, 28 Beav. 68; *Carter v. Carter*, 3 Key & J. 617; *Sturgis v. Moran*, 3 De Ges & Jones, 1; *Sharples v. Adams*, 32 Beav. 213; *Dove v. Lockart*, 32 Beav. 499.

---

1866.

## LEACH v. LEACH.

Jan. 30.

THE testator, by his will dated in 1858, gave his residuary estate to his widow for life, and after her death he gave a portion of it as follows :—

“I desire that the same may be divided, in equal proportions, between all my nephews and nieces (being thirteen in number), that is to say, the four children of my brother-in-law *George Richard Corner*, the four children of my brother *Charles Leach*, and the five children of my sister *Elizabeth Rawson*, widow of *Stansfield Rawson*, esquire, deceased, or to their executors, administrators and assigns. And the respective shares of such children to be absolutely vested on my decease, and, as to sons, to be payable at the respective ages of twenty-one years, (provided my said wife should have departed this life,) and in a daughter or daughters at that age or marriage.”

Gift of residue to widow for life, and afterwards to fifteen designated persons, “or their executors, administrators or assigns,” and “to be absolutely vested” on the testator’s death, and to be payable at twenty-one, provided the widow had died. *Held*, that the shares of two of the fifteen, who predeceased the testator, had lapsed.

The thirteen nephews and nieces were living at the date of the will.

The testator made a codicil in 1863, by which he confirmed his will.

The testator died in 1864, but previously to that time two of the nephews (*Francis* and *Charles Rawson*) had died after attaining twenty-one. *Francis* had died in the interval between the will and the codicil, and *Charles* between the date of the codicil and the testator’s death.

The question was, whether the executors of these two legatees were entitled to the one-thirteenth share.

Mr.



1866.

LEACH

v.

LEACH.

Mr. *Baggallay* and Mr. *George E. Cottrell* for the Plaintiffs.

Mr. *Southgate* and Mr. *W. H. Terrell*, for the Defendants, argued that the executors took by substitution for their testators. That as to *Francis*, the codicil confirmed the will, which was therefore brought down to the date of the codicil, when the executors of *Francis* had become designated persons.

They cited *Gittings v. M<sup>r</sup> Dermott (a)*.

*The MASTER of the ROLLS.*

I think it quite clear that these two legacies lapsed. The estate is given to the widow for life, and, after her decease, a portion of it to thirteen nephews and nieces. The testator was evidently desirous that they should all take vested interests at his death, and he pointed out the legatees, and declared that they were not to lose their shares if they should die in the life of the tenant for life. He gives to them "or" to their executors, administrators and assigns; what he means is this: that if they died before the period of distribution they might still assign their shares, and if not, it was to fall into their estates. To make it more clear, the testator says "to be absolutely vested on my decease." That is the period of vesting, and there is nothing to shew that the "executors, administrators and assigns" were to take as *personæ designatæ*, if the legatees died in the testator's lifetime.

I am of opinion, the use of the word "or" does not take this case out of the ordinary rule, which is, that the interest

(a) 2 *Myl. & Keen*, 69.

interest of a legatee cannot become vested until the death of the testator, and that it lapses if the legatee dies before the testator, though the legacy is not payable until the death of the tenant for life.

1866.

LEACH  
v.  
LEACH.

## LE BLANCH v. GRANGER.

Jan. 31.

**I**N this case, the captain in charge of a ship, which was in dock in this country, had entered into a charterparty with the Plaintiff for its employment. The owner was resident in this country, and had not, so far as appeared, authorized the captain to charter the ship.

This Court cannot decree the specific performance of a charterparty, but it can restrain the parties from employing the ship in a manner inconsistent with the rights under a charterparty.

The Plaintiff, insisting that the charterparty was binding on the owner, instituted this suit and obtained, *ex parte*, an *interim* injunction to restrain the employment of the ship otherwise than as agreed by the charterparty. This raised the question whether the captain, under these circumstances, had an implied authority to charter the ship.

Whether, when the ship and owner are both in this country, the captain can, without the special authority of the owner, charter the ship, *quære*?

Mr. *North* now moved, on notice, for the injunction. He cited *Smith's Mercantile Law* (a); *Maclachlan on Shipping* (b); *Story on Agency* (c); *Grant v. Norway* (d); *The Messageries Imperiales v. Baines* (e); *De Mattos v. Gibson* (f); *Sevin v. Deslandes* (g).

Mr. *Hobhouse* and Mr. *W. W. Mackison* for the owner of the ship. When the ship and its owner are in this country a captain has no authority to enter into

(a) *Page* 191 (6th ed.)  
(b) *Page* 121.  
(c) *Sects.* 36, 116, 123.  
(d) 10 *C. B. Rep.* 665.

(e) 11 *W. R.* 322.  
(f) 4 *De G. & Jones*, 298.  
(g) 30 *L. J. (Ch.)* 457.

1866.  
 ~~~~~  
 LE BLANC
 v.
 GRANGE.

NOT A CHARTERPARTY WITHOUT THE EXPRESS AUTHORITY OF THE OWNER. Secondly, it is a case for damages and not for an injunction.

MR. NORTH II. JUDG.

The MASTER of the RIGGA.

I am of opinion, that upon the Defendant giving an undertaking to be answerable in damages I ought to dissolve this injunction. I have no doubt as to the correctness of the proposition, which Mr. North mentioned, that where there is no question about the charterparty, though this Court cannot decree the specific performance of it, yet it can restrain the employment of a ship in a manner inconsistent with the rights given by the contract. But when there is a question as to the validity of the charterparty, the Court is bound to see which course will produce the greatest amount of damage, whether by dissolving or continuing the injunction. The ship may remain idle and at the hearing the charterparty may be found to be worth nothing.

The sole question, here, is as to the validity of the charterparty, and this does not depend on whether an agent, acting within the scope of his authority, can bind his principal, for nobody doubts that, or that the captain is, to some extent, the agent of the owner. But this is certain, that the captain cannot do everything in respect of the ship: thus he is not able in this country to sell the ship without the consent of the owner, or to create a bottomry bond, though he may, under certain circumstances, do so if the ship is abroad.

The

The question is, whether a captain in this country has authority to grant a charterparty without the sanction, authority or consent of the owner, and, on the evidence I have now before me, I am of opinion that it is not shewn to be within the scope of his authority. If the case rested on that alone, I should simply dissolve the injunction; but the Plaintiff may still bring forward further evidence at the hearing, and therefore I put the Defendant under an undertaking to be answerable in damages.

1866.

LE BLANCH
v.
GRANGER.

NOTE.—The bill was afterwards dismissed for want of prosecution, and the Plaintiff brought an action against the captain for contracting without authority.

HAMP v. HAMP.

THE question in this case was as to the right to a real estate, and which involved a point of legitimacy.

Jan. 18.

Motion for an issue before the evidence had been completed, held irregular, and refused with costs.

The Plaintiff filed his affidavits and gave notice of motion for a decree. Thereupon the Defendant, instead of filing his affidavits, moved for an issue to try the question.

Mr. Selwyn and Mr. Bevir for the Plaintiff.

Mr. Hobhouse, Mr. Hardy, Mr. Baggallay and Mr. Babington, *contra*.

George v. Whitmore (a); *Morrison v. Barrow (b)*, were cited.

The

(a) 26 *Beav.* 557.(b) 1 *De G., F. & J.* 633.

1895.

~~~~~

HARR

v.

HARR.

*The Master of the Rolls* without hearing the other side said.—

I am of opinion that this motion fails. The Plaintiff files a bill to establish his right to an estate, and he gives notice of motion for a decree, specifying all the affidavits by which he supports his case. The Defendant, knowing all the evidence on which the Plaintiff relies, moves for an issue, without entering into a word of evidence in support of his defence. This proceeding is perfectly novel.

I am referred to a case in which I laid down that the Court never does what is asked except by consent.

It does not stop here, for, in this very case, on the application for a Receiver, I pressed on the parties to make an arrangement as to trying the matter by an issue, but I stated expressly, that, except by consent, I could not make an order to that effect.

It does not end here. The Defendant, who knows the Plaintiff's evidence, instead of producing his own, asks for an issue.

When he brings forward his evidence, the Court will direct an issue if it finds it proper, but the only order I can now make is to refuse this motion with costs.

---

1866.

CHARD v. COX.

Jan. 31.

THE Plaintiff, having given notice of motion for a decree, applied to the record and writ clerks for a *subpœna duces tecum* to compel the production of a document at the hearing. The record and writ clerks declined to issue it as of course, on the ground that it could only be so issued where a replication had been filed.

Upon a motion for a decree, a *subpœna duces tecum* to produce a document at the hearing does not issue as of course.

Mr. *Villiers* moved that the writ might issue.

The MASTER of the ROLLS made the order.

MILES v. MILES.

Jan. 12, 15.

AT the date of his will, in 1862, the testator was the owner of a house in *Cannon Street, London*, built partly on fee simple land of his own, and partly on land held by him of the governors of *St. Thomas's Hospital*, under a lease dated in 1855, for the residue of a term of eighty years, at a rent of 100*l*.

By his will, the testator gave "all that my messuage, partly freehold and partly leasehold," in *Cannon Street*, according to the nature and tenure thereof, respectively, in trust for his widow for life, or, as to the leaseholds, for so long as the term and

By his will, dated in 1862, the testator devised to trustees, their heirs, executors and administrators, real estates in the counties of *Hereford* and *Radnor*, and also interest in them should exist, with remainder over. After the date of his will, the reversion in fee of the leaseholds was purchased by, and conveyed to, the testator:—*Held*, that the fee of the whole passed under the specific gift of "my messuage" at *C.*, and that the rest of the devise was descriptive.

1866.  
  
 MILES  
 v.  
 MILES.

also the messuage No. 3, *Cannon Street*, in the city of *London*, by the description following:—

“ And also all that my messuage, partly freehold and partly leasehold, No. 3, *Cannon Street*, in the city of *London*, being erected partly on my freehold ground there and on ground held by me of the treasurer and governors of *St. Thomas's Hospital*,” with their respective appurtenances, according to the nature and tenure thereof respectively, upon trust for his wife during her life, or, as to the said leasehold premises, for so long as the term and interest in the said leasehold premises should exist, but subject to keeping down the ground rents and other outgoings incident thereto in the meantime, and after her decease, to the use of his son *Henry Hugh Miles* for life, and after his decease to the use of his first and other sons, successively, according to seniority, in tail, with divers remainders over.

The testator declared it to be his wish, that the said estates, hereditaments and premises should not be sold.

The testator afterwards gave and bequeathed the residue of his estate and effects to his trustees, “ upon trust, *with all convenient speed after his decease, to sell, dispose of and convert into money* “all such parts as should not consist of monies, and to divide the produce between his wife and his three children.

In *February*, 1865, the testator purchased, from the governors of *St. Thomas's Hospital*, the reversion of the premises comprised in the lease, and which was, by indenture of the 23rd of *February*, 1865, conveyed to him in fee. By means of this conveyance, the testator's  
 leasehold

leasehold interest in the messuage No. 3, *Cannon Street*, became merged in the freehold.

1866.

MILES

v.

MILES.

The testator died in *April*, 1865, without having altered his will.

The widow and one of the children contended, that the premises comprised in the indenture of the 23rd of *February*, 1865, did not pass under the specific devise. The other children contended that the fee simple of the premises passed.

Mr. *Whately* for the Plaintiff, a trustee.

Mr. *Hobhouse* and Mr. *Blackmore* for the residuary devisees. The part of the *Cannon Street* premises, held originally under *St. Thomas Hospital*, passed under the residuary gift, for, at the testator's death, his "term and interest" which alone was the subject of the gift, had merged and ceased to "exist."

The case of *Capel v. Girdler* (a) distinctly shews, that before the late Wills Act, the bequest of these leaseholds would have been adeemed. In that case, a tenant for years purchased the reversion in fee after the date of his will, and it was held that the whole interest of the testator passed to the heir, and not to the residuary devisees and legatees. In *Emuss v. Smith* (b), a point precisely similar to the present was decided, though it does not appear by the report. In that case, the testator, by his will (1830), devised a leasehold garden at *Falsam Pitts* for the residue of his term therein (p. 723). In 1840, he took a conveyance in fee to himself of the property (p. 728), and he died in 1841.

It

(a) 9 Ves. 509.

(b) 2 De G. &amp; Sm. 722



1865.  
BAILLIE  
v.  
M'KEWAN.

*December, 1861, made to Dr. James Baillie, must, in the circumstances of this case, be considered as having been made to him in his character of trustee for the Plaintiffs, as it was subsequent to the arrangement made between him and his cestuis que trust, which was, that the trust property should be employed in purchasing the house, and, in fact, the trust property was actually so employed.*

In this state of circumstances, in my opinion, the assignment to him could not be taken by him in any other character than that of trustee, and this relation being then created, it was not in the power of *Dr. James Baillie* to mortgage the property which did not belong to him to the company.

I am of opinion, that the Plaintiffs are entitled to the decree they ask against the banking company, who must reconvey the legal estate in the house No. 9, *Westbourne Square*, to the new trustee, upon the trusts of the settlement.

The costs must follow the event, including the costs of the action.

---

NOTE.—See *Prosser v. Rice*, 28 Beav. 68; *Carter v. Carter*, 3 Kay & J. 617; *Sturgis v. Morse*, 3 De Gex & Jones, 1; *Sharples v. Adams*, 32 Beav. 213; *Drew v. Lockett*, 32 Beav. 499.

---

1866.

## LEACH v. LEACH.

Jan. 30.

THE testator, by his will dated in 1858, gave his residuary estate to his widow for life, and after her death he gave a portion of it as follows:—

“I desire that the same may be divided, in equal proportions, between all my nephews and nieces (being thirteen in number), that is to say, the four children of my brother-in-law *George Richard Corner*, the four children of my brother *Charles Leach*, and the five children of my sister *Elizabeth Rawson*, widow of *Stansfield Rawson*, esquire, deceased, or to their executors, administrators and assigns. And the respective shares of such children to be absolutely vested on my decease, and, as to sons, to be payable at the respective ages of twenty-one years, (provided my said wife should have departed this life,) and in a daughter or daughters at that age or marriage.”

Gift of residue to widow for life, and afterwards to fifteen designated persons, “or their executors, administrators or assigns,” and “to be absolutely vested” on the testator’s death, and to be payable at twenty-one, provided the widow had died. Held, that the shares of two of the fifteen, who predeceased the testator, had lapsed.


The thirteen nephews and nieces were living at the date of the will.

The testator made a codicil in 1863, by which he confirmed his will.

The testator died in 1864, but previously to that time two of the nephews (*Francis* and *Charles Rawson*) had died after attaining twenty-one. *Francis* had died in the interval between the will and the codicil, and *Charles* between the date of the codicil and the testator’s death.

The question was, whether the executors of these two legatees were entitled to the one-thirteenth share.

Mr.

1866.  
  
 MILES  
 v.  
 MILES.

is given is the messuage itself, and that the words "partly freehold and partly leasehold" are merely descriptive of the parcels; it means, I give the whole of the messuage No. 3, *Cannon Street*. The words, "so long as the term and interest in the said leasehold premises should exist," means any interest in that part which is described as leasehold. He has since increased this from a term to a perpetuity, and I think the intention still subsists.

The opposite conclusion would tend to the incongruity pointed out by counsel, viz. that having, in his will, expressed his wish that this particular messuage should not be sold, he directs that his residuary real and personal estate shall, with all convenient speed after his decease, be sold, which would include the reversion of this messuage unless the whole passed by the specific devise of it. This, I think, shews that the intention of the testator was, that the whole messuage should so pass.

It is scarcely possible that the testator should have intended to devise the freehold portion of the premises, so as to go in a particular way to persons in succession, and the remainder of the messuage, being leasehold, should go in a different way, by being sold and divided between the children as tenants in common.

I treat the word "messuage" as I did the word "estate" in the case of *In re the Midland Railway Company v. The Oxley and Ilkley Branch* (a), where an addition was made to the estate after the date of the will, and I held that the whole passed. Here, I think the messuage is described, and an addition has been made to it. Suppose he had renewed the lease, or had obtained an extension of the term for 100 or 1,000 years, still it would have passed; here the question only arises because the term is merged.

But

(a) 34 *Beav.* 525.

But I think that the will shews that the gift is to operate, and that not only no contrary intention appears by the will, but that an intention in favor of its passing is to be found in the will. The facts I have mentioned distinguish this case from *Emuss v. Smith (a)*, and reconcile it with the other cases cited.

I will make a declaration accordingly.

(a) 2 *De G. & Sm.* 722.

1866.

MILES  
v.  
MILES.

#### MOSS v. BARTON.

Jan. 12.

**B**Y a memorandum of agreement, dated in *November*, 1857, Alderman *Wire* agreed to let some premises in *Moorgate Street, London*, to the Plaintiff Mr. *Moss*, at a rent of 1111*l.*, for a term of three years, to be computed from *Christmas-day*, 1857. Alderman *Wire* also agreed "at the request of" the Plaintiff "to grant him a lease of the said premises for five, seven, fourteen or twenty-one years, from the expiration of the aforesaid three years' occupancy, at the same rent." The Plaintiff, on his part, agreed, during his occupancy, to keep the premises in good, substantial and ornamental repair.

*A.* agreed to let some premises to *B.* for three years, and, at the expiration of that term, to grant him a lease for an extended term. *A.* died, and, three years having expired, *B.* continued to hold on under *A.*'s executors four years for without asking for a lease. He then required a lease. *Held*, that *B.*'s option had not determined, and that he was entitled to the extension of the term.

The Plaintiff was in possession at the date of the agreement, and he continued in the occupation and paid his rent to Alderman *Wire* until the Alderman's death, which occurred on the 9th of *November*, 1860. The three years expired on the 24th of *December*, 1860, and the Plaintiff still continued in occupation as before, and paid his rent to the Defendants, the executors of Alderman *Wire*. The Defendants appeared to have been, for some time, ignorant of the Plaintiff's right of option to take

1866.  
  
 MOSS  
 v.  
 BARTON.

take an extended term, which he, for some time, never attempted to exercise, and they seemed to have treated him as a tenant from year to year. The Plaintiff entered into a negotiation with the Defendants for the purchase of the premises, and, in *February*, 1862, in a letter to them, he stated that he had the option of quitting the premises at the end of the year, or of taking a lease for a lengthened period, and he proposed taking a lease for seven, fourteen or twenty-one years at his option, "if the rent were very considerably reduced." Nothing came of this. It appeared also, that, in *September*, 1863, the Plaintiff had called on the Defendants to pay for the repairs of the front wall, which was falling, and that they had consequently paid the builder 16*l.* 8*s.* for them, and that through the hands of the Plaintiff.

The Defendants having, in *September*, 1864, given the Plaintiff notice to quit, he in *October*, 1864, claimed a lease for the extended term. This the Defendants refused to grant, and the Plaintiff instituted this suit, in *February*, 1865, for the specific performance of the agreement of *November*, 1857.

Mr. *Baggallay* and Mr. *Rigby* for the Plaintiff. The agreement of *November*, 1857, is not a lease at law, but an agreement for occupancy for three years, with an option of extending it to seven, fourteen or twenty-one years, and such an agreement this Court will enforce; *Parker v. Tuswell* (a). The Plaintiff's right to have a lease continued until his tenancy had been put an end to; *Hersey v. Giblett* (b). In that case, the yearly tenancy commenced in 1845, and the option was not exercised until 1852, but it was held valid. The Plaintiff's letter of *February*, 1862, was no waiver of his right, it  
 stated

(a) 27 *L. J. (Ch)* 812.

(b) 18 *Beav.* 174.

stated that he was entitled either to a lease or to give up possession, and the Plaintiff, before he exercised his option, asked the executors if they would grant him a lease at a reduced rent; this was no waiver or abandonment. Neither did the claim for the repairs determine the right of option, it was made under a mistake of law, for whether holding over or not, the tenant was bound to do the repairs; *Richardson v. Gifford* (a); *Digby v. Atkinson* (b). There has been no abandonment or waiver of the right; *Clarke v. Moore* (c); *Price v. Dyer* (d); and the tenant, who has laid out money on the faith of his agreement, is entitled to have it performed; *Dann v. Spurrier* (e).

1866.

MOSS  
v.  
BARTON.

Mr. Southgate and Mr. Surrage for the Defendants. The Plaintiff has waived and abandoned any right he ever had. An option like the present ought to be exercised within a reasonable time, especially after the death of the lessor. Here the Plaintiff has thought fit to remain in possession as tenant from year to year, instead of binding himself for a term. His conduct has been quite inconsistent with having a continued right to take a lease. He proposed to take a different lease at a very considerable reduction of rent, and he insisted that the Defendants were bound to repair, though, by the agreement, he had contracted to do so, and he forced the Defendants to pay for them. All this is inconsistent with a continuing right to have a lease of a different description. This case differs from *Hersey v. Giblett* (f), for there, the Plaintiff, from the first, was a mere yearly tenant, and he was allowed to continue and his right therefore to an extended term continued. But here, the Plaintiff's tenancy was for three years certain, which expired nearly four

(a) 1 *Adol. & Ellis*, 52.(b) 4 *Camp.* 275.(c) 1 *Jones & Lat.* 723.(d) 17 *Ves.* 356.(e) 7 *Ves.* 231.(f) 18 *Beav.* 174.

1866.

Moss

v.

BARTON.

four years before he made his claim, and more than five years before the bill was filed.

*The MASTER of the ROLLS.*



I think the Plaintiff is entitled to a decree. In the first place, the document of 1857 is a clear agreement to grant a lease for five, seven, fourteen or twenty-one years, and the Plaintiff is entitled to call upon the Court for its specific performance, unless he has done something to deprive himself of that right. The only facts relied on by the Defendants are these: the Plaintiff had continued to occupy the premises to the death of *Wire*, which was a month prior to the expiration of the three years, and from that time he was entitled to call on the executors for the performance of their testator's agreement to grant him a lease. There was no time specified in the agreement within which he was to call for it, and both parties may have considered that he was afterwards holding over as tenant from year to year. But if the executors thought fit to allow him to hold the property from year to year, there was nothing to prevent him from insisting on the lease; his right to take a lease would exist at any time, unless he gave it up. They might have called on him either to go out or take a lease; but they did nothing of the sort. They say that they had no notice of the document; but the letter of *February*, 1862, gave them full notice of it. Why did they not then call on him to exercise his option? If they knew of its existence, they also knew that the right continued until positively waived; but they did nothing.

The case of *Hersey v. Giblett* (a) shews, that a person having such an option may exercise it at any time while he

(a) 18 *Beav.* 174.

he remains tenant, if the landlord does not call on him either to exercise or decline it at an earlier period. That is when no time is specified in the agreement within which the option is to be exercised.

1866.

Moss  
v.  
BARTON.

I do not think the claim for payment of the repairs any waiver of the agreement. The Plaintiff seems to have thought, that if he was tenant from year to year, he was not bound to pay for these repairs; in that I think he went too far.

I am of opinion that the Plaintiff is entitled to a decree with costs, but he must refund the 16*l.* 8*s.*

---

TEMPEST *v.* LORD CAMOYS.

THE testator, Sir *C. R. Tempest*, died in 1865, having, by his will, devised real estates to Mr. *Stonor* and Mr. *Fleming* upon certain trusts, and having appointed Mr. *Stonor*, Mr. *Fleming* and Lord *Camoy's* his executors.

Mr. *Stonor* died in the lifetime of the testator.

This suit was instituted by Mr. *Tempest*, who was interested under the trusts of the will, for the administration of the real and personal estate, for a receiver, and for the appointment of a new trustee, in the place of Mr. *Stonor*. The bill alleged that the will had been proved by the surviving executors, Lord *Camoy's* and Mr. *Fleming*.

Jan. 18.  
To a bill for the administration of real and personal estate, and for the appointment of a receiver and a new trustee, a plea in bar, by the alleged executors, that they had been prevented proving by the Plaintiff's entering a caveat in the Court of Probate, was overruled.

Mr. *Fleming* and Lord *Camoy's* put in the following plea



1866.

TEMPEST  
v.  
LORD  
CAMOYS.

plea in bar to the whole relief and discovery sought by the bill :—

We say that, immediately after the death of the testator, the solicitor of the Plaintiff entered a *caveat* in the Court of Probate to prevent any person from proving the will and codicil of the testator, and that he thereby prevented probate being obtained of such will and codicil, or the constitution of a legal personal representative of the testator, and that, in consequence of the aforesaid act of the Plaintiff's solicitor, and, in fact, we have not, nor has either of us, proved the said will or codicil, or been constituted, in any manner, legal personal representatives or legal personal representative of the testator, and we are not, nor is either of us, nor have we, nor has either of us, ever been executors or executor or legal personal representatives or legal personal representative of the said testator.

Mr. *Hobhouse* and Mr. *Kay* in support of the plea. This negative plea, that the will has not been proved, as alleged by the bill, but that it is in litigation, is a complete answer to the bill. Such a plea was allowed in *Cooke v. Gittins* (a).

The bill should have been confined to the protection of the estate pending the litigation in the probate court; *Overington v. Ward* (b); *Rawlings v. Lambert* (c). The estate can only be administered after some duly constituted legal personal representatives have been appointed. The Plaintiff cannot be allowed to contest the will in the probate court and assert that these gentlemen are not the executors, and to insist, in this Court, on the validity of the will, and that the Defendants are executors under it.

*The*

(a) 21 *Beav.* 497.  
(b) 34 *Beav.* 175.

(c) 1 *John. & Hen.* 458.

*The MASTER of the ROLLS.*

I cannot allow this plea *simpliciter*; it is clear that the Plaintiff is entitled to have a new trustee appointed. The bill alleges that one of the trustees has died, and it asks for the appointment of a new one. That does not depend upon the probate of the will, for there might be relief here as to the real estate, which would not depend on the Defendants being the legal personal representatives. I am inclined, subject to what I hear, to allow the plea to stand for an answer. Then there would remain the question of costs.

Mr. *Cole* and Mr. *Little* in support of the bill. This is a plea "in bar," and not for want of parties. The relief asked by the bill is in respect both of the real and of the personal estate. The Defendants might have pleaded for want of parties to the part relating to the personal estate alone; but such a plea is inapplicable to the realty, as to which the Plaintiff is clearly entitled to relief independently of the executors. The Defendants' character of executors depends on the will, and not on the probate, they insist on their filling that character, and they may have acted as such. They referred to *Van Heythusen* (a); *Penny v. Watts* (b); *Fry v. Richardson* (c).

*The MASTER of the ROLLS.*

This plea must stand for an answer, with liberty to except, and the Plaintiff may file interrogatories. The costs must be costs in the cause.

(a) *Vol. 2, p. 95.*  
(b) *2 Phil. 149.*

(c) *10 Sim. 475.*

---

NOTE.—See *Hinde v. Skelton*, 34 *L. J. (Chanc.)* 378.

1865.

**Re THE BRIGHTON CLUB AND NORFOLK  
HOTEL COMPANY (LIMITED).**

*May 8.*

The provisions in the 25 & 26 *Vict. c. 89*, ss. 79, 80, for winding up a company, in default of its paying a debt three weeks after notice, do not apply, where there is a *bonâ fide* dispute as to the amount due, though there may be an admitted debt exceeding 50*l.*

THE Petitioner, Mr. *Reynolds*, had, in *June*, 1864, contracted with this company for the erection of certain buildings, to be certified in the usual manner by their architect. The architect, being dissatisfied, had refused to make further certificates. The Petitioner, in *February*, 1865, served the company with notice, under "*The Companies Act, 1862*," to pay him the balance of 4,358*l.* claimed by him. The company not having paid the Petitioner, he, at the expiration of three weeks, presented this petition for winding up the company. The Petitioner's claim was *bonâ fide* disputed by the company, but more than 50*l.* was confessedly due to the Plaintiff.

By "*The Companies Act, 1862*" (25 & 26 *Vict. c. 89*, ss. 79, 80), a company "may" be wound up under the following circumstances:—

"Whenever a creditor, to whom the company is indebted in a sum exceeding 50*l.*, has served a demand requiring payment, and the company has, for the space of three weeks succeeding the service of such demand, neglected to pay such sum, or to secure or compound for the same to the reasonable satisfaction of the creditor."

Mr. *Selwyn* and Mr. *Swanston*, in support of the petition, relied on the strict terms of the act, there being a clear debt above 50*l.*, and a default for more than three weeks after demand in payment. They argued

argued, that, at all events, the petition ought to stand over until the Petitioner had either substantiated his claim or had failed in doing so; *Re The Rhydydefed Colliery Company (a)*; and see *The Catholic Publishing, &c., Company (b)*.

Mr. *Jessel* and Mr. *E. Romilly*, for the company, were not called on.

1865.

Re  
THE  
BRIGHTON  
CLUB AND  
NORFOLK  
HOTEL  
COMPANY  
LIMITED.

*The MASTER of the ROLLS.*

This is a novel experiment, and if I acceded to the application, the consequence would be very serious to public companies. The meaning of the act is this:— if a debt above 50*l.*, which is not *bonâ fide* contested, be not paid or arranged within three weeks after demand, the Court may order the company to be wound up. It is not sufficient for a company to say, “we dispute the debt;” they must shew some reasonable ground for doing so. This is a *bonâ fide* contested debt, and, though more than 50*l.* appears to be due, I do not think that it is such a case as was intended by the act.

[His Honor then referred to the following cases: *Bliss v. Smith (c)*; *Hotham v. East India Company (d)*; *Ambrose v. The Dunmow Union (e)*; *Kirk v. The Bromley Union (f)*; *Waring v. The Manchester, &c., Railway Company (g)*; *Scott v. The Corporation of Liverpool (h)*; *M’Intosh v. The Great Western Railway Company (i)*, to shew that, under building contracts,

(a) 3 De G. & J. 80.

(b) 2 De G., J. & Sm. 116.

(c) 34 Beav. 508.

(d) 1 Term Rep. 638.

(e) 9 Beav. 508.

(f) 2 Phil. 640.

(g) 7 Hare, 482.

(h) 3 De G. & J. 334.

(i) 2 De G. & Sm. 758; 3 De G. & Sm. 146, and 2 Mac. & Gor. 74.

1865.

}

Re

THE

BRIGHTON  
CLUB AND  
NORFOLK  
HOTEL  
COMPANY  
LIMITED.

contracts, this Court only interferes in cases of fraud or complication of accounts, and he proceeded :]

The whole of the evidence which has been laid before me clearly establishes that this is a contested question of account between the company and the Petitioner, though something is due to him which would exceed the 50*l.* mentioned by the statute. This, however, is not the case within the statute, for what should I have to do if I made the order? I could do nothing but take an account between these parties. If I made the order, I should still say to the company, provided you pay what is now due to the Petitioner, I will stop the proceeding.

Suppose the company said, "we are now willing to pay the debt," then this question would arise: What is the debt, what is really due to the Petitioner on the claim? I must then take the accounts, and do the very thing which cannot be done except by bill, unless in cases where there is fraud and collusion, and I should thus take complicated and contested accounts, between solvent persons, under the powers of an act of parliament which meant to do nothing but to wind up insolvent companies and to make them pay their debts, so far as their assets would extend. Far from being insolvent, this company is carrying on a thriving business, which I am asked to stop, merely because there is a quarrel between the company and their contractor as to what is due to him.

The petition must be dismissed with costs.

---

1866.

*Re* THE GENERAL ROLLING STOCK  
COMPANY (LIMITED).

**CHAPMAN** was a clerk of this company at a salary of 50*l.* a year, which had been duly paid to him down to *Michaelmas*, 1864.

In *February*, 1865, an order had been made to wind up the company, and *Chapman* now asked to be paid three months' arrears of salary in full, and to prove for his subsequent salary down to the date of the notice of discharge, together with a quarter's salary from that time in lieu of notice. This raised a question whether he was to be considered discharged as from the date of the winding up order, or continued until some formal notice had been given to him by the liquidator.

*Mr. Phear* in support of the application. The Bankrupt Act (12 & 13 *Vict.* c. 106, s. 168) authorizes the Court to order three months' arrears of salary to be paid to any servant or clerk, and, by analogy, the Court may exercise its discretion in favour of the clerks and servants of a bankrupt company under "The Companies Act, 1862" (25 & 26 *Vict.* c. 89, s. 98), which empowered the Court to apply the assets of a company "in discharge of its liabilities." Clerks and servants cannot be discharged except by due notice.

*Mr. Southgate* and *Mr. Wickens*, for the Official Liquidator, argued that the discharge of the clerks and servants of the company must be considered as having occurred upon the making of the winding up order, when the company could no longer employ them.

*Jan. 16.*

The Court cannot direct payment, in full, to a clerk in a company which is being wound up of three months' arrears of salary, as in the case of a bankruptcy, but he must come in *pari passu* with the other creditors of the company.

The order to wind up a company is notice to the servants of the company of their discharge from its service.

*The*

1866.

Re  
GENERAL  
ROLLING  
STOCK CO.  
LIMITED.

*The MASTER of the ROLLS* said that the "Companies Act, 1862," gave him no authority to order payment to the applicant of a quarter's salary in full; and that this could only be done, as under the Bankruptcy Act, by an express enactment, and that therefore the applicant must come in like the other creditors. Secondly, that the advertisements as to winding up the company were notice, and that the order for winding up, when made, must be considered as notice to the clerks and servants of the company of their discharge from the company's service.

1865.

Feb. 8, 10, 15.

The Plaintiff, apprehensive of being indicted for bigamy (which it turned out he was not liable to be) conveyed real property to the Defendant, on a parol agreement to re-transfer when the difficulty had passed. On a bill for a re-transfer, the Defendant denied the agreement and insisted on the Statute of Frauds, the trust not being in writing.

*Held*, that this

was a case of fraud and that the statute did not apply.

A witness made an affidavit and died four days afterwards, and before she could be cross-examined. Her evidence was admitted at the hearing.

## DAVIES v. OTTY. (No. 2.)

THIS case, which is reported *ante* (a), on a demurrer, now came on for hearing, but upon allegations of a different state of facts, which the Plaintiff had introduced by amendment. The following statement is founded on the conclusions arrived at by the Court, upon the evidence in the cause.

It appeared that, in 1860, the Plaintiff *Davies* was entitled to three-and-a-half shares in a building society and to a piece of land and some houses, which he had mortgaged to the society, in the usual way in such cases, for securing to the society an advance of money made to him.

By an indenture dated the 17th of *January*, 1860, made between the Plaintiff *Davies* of the one part and the

(a) 33 *Beav.* 540.

the Defendant *Otty* (his step-son) of the other part. This indenture recited the Plaintiff's title, and proceeded as follows :—

“ And whereas *Matthew Otty* has taken from *Thomas Davies* all his shares in the said benefit building society, and has contracted and agreed with *Thomas Davies* for the absolute purchase of the said piece of land, messuages,” &c. “ (subject to the payment by *Matthew Otty*, his heirs, executors, administrators or assigns, of all the payments which, from the 6th day of *January* instant, shall become payable for or in respect of the shares in the said society so taken by the said *Matthew Otty* from the said *Thomas Davies* as aforesaid) for the sum of 20*l.*” It then witnessed, that the Plaintiff, in consideration of 20*l.* paid by the Defendant to the Plaintiff and of the Defendant's covenant, conveyed to the Defendant and his heirs the land and houses, subject to the mortgage and to the payments to the building society. And the Defendant covenanted to make the several payments to the building society, and to indemnify the Plaintiff therefrom.

The circumstances under which this deed was executed appeared to be as follows :—In 1844, the Plaintiff's wife deserted him, and left the place with her paramour. In 1854, the Plaintiff (who had never heard of his wife since her elopement, and believed her to be dead) married a second wife. Five or six years afterwards, (1860) the Plaintiff was informed that his first wife was still living, and fearing a prosecution for bigamy, an arrangement was come to, between the Plaintiff and Defendant, that the Plaintiff should transfer the above property until the “difficulty” in which the Plaintiff was had passed over. It was proved by two witnesses that the “distinct understanding” between them was, that the transfer “was to be a nominal one, and was to

1865.

DAVIES  
v.  
OTTY.



1865.  
  
 DAVIS  
 v.  
 OTT.

be done away with when the unpleasantness was over." The Plaintiff afterwards discovered that the lapse of seven years from the time he knew that his first wife was alive protected him against any proceedings for bigamy, and, in 1863, he called on the Defendant to reconvey the property to him. This the Defendant refused to do, and he claimed it beneficially as his own.

It was proved, that the Plaintiff had, in the meantime, been allowed to remain in possession of the property, and that the Plaintiff had himself made the several payments to the society. The consideration of 20*l.* was not paid in money on the execution of the deed; but the Defendant, who, at that time, held the bill of the Plaintiff for that amount, alleged that the non-payment of this bill was the real consideration. But it was also proved that the amount of this bill had been paid by the Plaintiff to the Defendant since the execution of the deed.

The Defendant denied the trust, and insisted on the Statute of Frauds (29 *Car. 2*, c. 3), the sections relating to which are as follows :—

Sect. 7. "And be it further enacted, that all declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by some writing, signed by the party who is, by law, enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

Sect. 8. "Provided always, that where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by any act or operation of law, then and  
 in

in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made, anything hereinbefore contained to the contrary notwithstanding."

1865.  
  
 DAVIES  
 v.  
 OTTY.

Mr. *Baggallay* and Mr. *H. M. Jackson*, for the Plaintiff, argued, first, that the Plaintiff was entitled to a re-conveyance, the deed having been executed under a misapprehension and mistake, and also on the express undertaking of the Defendant to re-convey. That there was no illegality in the nature of the transaction to prevent the Plaintiff from obtaining equitable relief, there being no crime in his second marriage after the disappearance for so long a time of the first wife. Secondly, that the 7th section of the Statute of Frauds was inapplicable, there being a part performance and a fraud, and that these were sufficient grounds for taking the case out of the statute, for Courts of Equity never allow the Statute of Frauds to cover a fraud. But that if the case were within the statute, it came within the 8th section, there being a constructive trust in favour of the Plaintiff, who had never received the alleged purchase-money. They cited *Childers v. Childers* (a); *Birch v. Blagrove* (b); *Platermone v. Staple* (c); *Roberts v. Roberts* (d); *Cecil v. Butcher* (e); *Ward v. Lant* (f); *Dale v. Hamilton* (g); *Lincoln v. Wright* (h); *Statute of Frauds* (i); 24 & 25 Vict. c. 100, s. 57.

Mr. *Hobhouse* and Mr. *W. W. Cooper* for the Defendant. The evidence and the nature of the transaction shew that an absolute conveyance was contemplated and

(a) 3 Key & J. 310, and 1 De G. & J. 482.  
 (b) *Ambl.* 284.  
 (c) *Sir G. Coop.* 250.  
 (d) 2 *Barn. & Ald.* 369.

(e) 2 *Jac. & W.* 565.  
 (f) *Proc. Ch.* 182.  
 (g) 5 *Hare*, 369.  
 (h) 4 *De G. & J.* 16.  
 (i) 29 *Car.* 2, c. 8.

1865.  
  
 DAVIES  
 v.  
 OTTY.

and was essential for the object, and the alleged agreement is expressly denied by the Defendant. The case is one intended to be met by the statute, the 7th section of which is express:—that all creations of trusts shall be in writing or else be utterly void. No parol evidence is, therefore, admissible of such a trust. There is no constructive trust or part performance. If the denial of a parol trust is to be considered a fraud, this section of the statute would be inoperative, the object of it being to prevent perjury by excluding parol evidence, and by not allowing a trust of land to be proved by anything but by some writing. They cited *Brackenbury v. Brackenbury* (a); *Curtis v. Perry* (b); *Lindsay v. Lynch* (c); *Kendall v. Beckett* (d); *Wright v. Wilkin* (e); *Gascoigne v. Thwing* (f); *Groves v. Groves* (g); *Statute of Frauds* (h); *Bartlett v. Pickersgill* (i); *Lord Irtham v. Child* (k); *Cawley v. Poole* (l).

Mr. Baggallay in reply.

---

*The MASTER of the ROLLS.*

Feb. 15. Upon considering this case, and looking at the various authorities on the subject, and after referring again to the evidence, I am of opinion that the Statute of Frauds can have no application to this case.

Assuming (which I do for the present) that there was nothing whatever illegal in the transaction (the existence of

(a) 2 Jac. & W. 391.

(b) 6 Ves. 739.

(c) 2 Sch. & Lif. 1.

(d) 2 Russ. & M. 88.

(e) 4 De G. & J. 141.

(f) 1 Vern. 366.

(g) 3 Y. & Jer. 163.

(h) 29 Car. 2, c. 3, s. 4.

(i) 1 Cox, 15, and 1 Eden, 515.

(k) 1 Bro. C. C. 92.

(l) 1 Hem. & Mil. 50.

of which would, of course, alter the case), I consider it is proved, by the evidence, that the Plaintiff, apparently in a difficulty, or afraid of getting into one, transferred this property to the Defendant, who thereupon agreed that he would re-transfer it to the Plaintiff when required; but when the time for the re-transfer arrived, the Defendant refused to re-transfer it. Such being the facts, I am of opinion that it is not a case to which the Statute of Frauds applies. There was no consideration paid by the Defendant, the 20*l.* mentioned in the deed never having been paid; for the Plaintiff's bill of exchange held by the Defendant, and which he states to be the consideration for the deed, appears, by the evidence, to have been afterwards repaid by the Plaintiff by instalments in various sums. This being so, I am of opinion that "it is not honest to keep the land." If so, this is a case in which, in my opinion, the Statute of Frauds does not apply. I think that the subsequent course of dealing confirms this view; for the Plaintiff has ever since been allowed to remain in possession of the property, and he has paid all the instalments to the benefit building society. In my opinion, therefore, this case comes within the 8th section of the Statute of Frauds, and is excepted from the operation of the prior section. Therefore, the case is not such as entitles the Defendant to set up the Statute of Frauds as a ground for allowing him to retain the property.

I am also clearly of opinion there was no illegality in the transaction, and that the Plaintiff was quite justified, morally and legally, in marrying the second wife, although the effect of it may have been, that she did not become his wife. The long absence of his first wife was sufficient to justify the Plaintiff in coming to the conclusion that she was dead, and would have induced

1865.

DAVIES  
v.  
OTTY.

1865.  
 ~~~~~  
 DAVIES
 v.
 OTTY.

induced this Court to have come to the same conclusion, and, possibly, to have acted on it, by paying money out of Court on that footing. That being so, I am of opinion that the Plaintiff is entitled to a decree.

The costs of the conveyance were paid for by the Defendant, and I am of opinion that the Plaintiff ought to repay them; and, upon the Plaintiff's undertaking to repay them, I shall order a re-conveyance at the expense of the Plaintiff. Cancelling the deed would not be sufficient, unless it was originally void, and I do not think it was. The Plaintiff must have his costs of suit.

Another point arose in this case in regard to the evidence. *Susannah Davies* made an affidavit on behalf of the Plaintiff, which was sworn on the 28th of *August*, 1864. She died on the 1st of *September*, 1864, and her affidavit was filed on the 14th of *December*, 1864. Thus the Defendant had had no opportunity of cross-examining her. It was objected that her affidavit could not be received in evidence. As to this—

The MASTER of the ROLLS said,—

I stated that I thought the evidence of *Susannah Davies* must be admitted. It appears that her evidence was given on the 28th *August* last year, and that she died two or three days afterwards, which made it impossible to cross-examine her; but there being no impropriety and nothing wrong in examining her, and no keeping her out of the way to prevent a cross-examination, I must receive her evidence and treat it exactly in the same way that I should the evidence of any other witness who, from any cause whatever, either h

not been cross-examined or whom it was impossible to cross-examine.

1865.

DAVIES

v.

OTTO.

NOTE.—See 19th Order of the 5th of February, 1861; *Braithwaite v. Kearns*, 34 Beav. 202, and the references; *Ridley v. Ridley*, *ibid.* 329.

In re GRATWICK'S SETTLEMENT.

Nov. 26.

BY a settlement, made, in 1811, on the marriage of *Edward* and *Ann Gratwick*, a sum of 600*l.* consols was held in trust for *Ann Gratwick* for life, with remainder to *Edward Gratwick* for life. "And from and after the decease of the survivor of them, *Edward Gratwick* and *Ann Gratwick*, leaving issue one or more child or children *then living*, then, as to the said sum of 600*l.* and the stocks, funds or securities on which the same may be invested, upon trust for all and every the child or children of *Edward Gratwick* and *Ann Gratwick*, in such parts, shares and proportions" as they should jointly by deed or as *Ann Gratwick* should by her will appoint. "And in default of such direction or appointment, upon trust for all and every *such* child or children" in equal shares, the shares of sons to vest at twenty-one, and of daughters at that age or marriage.

A testatrix bequeathed "all moneys belonging to her in the £3 per Cent. Consols" to two children and her son's widow. The only consols she was interested in were settled on her for life, with power to appoint amongst her children. Held, that the will operated as an execution of the power as regarded the two-thirds to the two children, although it contained no other reference to the power or to the subject of it.

There were four children, all of whom attained twenty-one, viz., *Edward* (deceased), *Thomas*, *Mary* and *John* (deceased).

On the marriage of *A.* and *B.*, personalty

was limited to them for their lives, and after the decease of the survivor, "leaving one or more child or children then living," on trust "for all and every the child and children" of *A.* and *B.* as *B.* should by will appoint, and, in default of appointment, "upon trust for all and every such child and children" equally. Held, that, to entitle a child to take in default of appointment, it was not necessary that he should survive his parents.

1865.

In re
GRATWICK'S
SETTLEMENT.

Ann Gratwick survived her husband and two of her children, and she died in 1864.

By her will, made in 1864, "she gave and bequeathed all money belonging to her in the £3 per Cent. Consols, or in any other stocks or funds of *Great Britain*, with the dividends thereon, and all other money that she might die possessed of or become entitled to," to her son *Thomas*, her daughter *Mary* and *Ann Gratwick* the younger (the widow of her deceased son *Edward*) in equal shares.

The will of the testatrix contained no reference to the power of appointment given to her by the settlement, and no expression of her intention to exercise such power. The testatrix was not possessed of or entitled to any Government stocks or funds whatever, either at the date of her will or at the time of her decease, save only, so far as she was entitled to the sum of 600*l.* consols during her life, and to her power of appointment over it in favor of the children.

It was admitted that the appointment in favor of the widow of the deceased son *Edward* was invalid; and the questions on this petition were, whether the testatrix had duly appointed the fund in question, and to whom it belonged?

Mr. *Hallett* for the Petitioners *Thomas* and *Mary*. First, the appointment to the surviving children exclusively is a good execution of the power; *Boyle v. The Bishop of Peterborough* (a); *Woodcock v. Renneck* (b); *Paske v. Haselfoot* (c). The appointment to the widow
of

(a) 1 *Ves. jun.* 299.(c) 33 *Beav.* 125.(b) 4 *Beav.* 190; 1 *Phil.* 72.

of *Edward* being invalid, two-thirds of the fund are therefore well appointed to the Petitioners. Next, the surviving children alone take the remaining one-third, for the power arises after death of the parents "*leaving issue one or more child or children then living.*" The children then living alone are objects of the power, and the gift in default of appointment is to the same class, namely, "for all and every *such* child and children," i. e. those then living or living at the death of the surviving parent.

1865.

In re
 GRATWICK'S
 SETTLEMENT.

[*The MASTER of the ROLLS.* The words "every such child and children" refer to the last antecedent, which is "all and every the child and children."]

Secondly, the consols held in trust were duly appointed, for the testatrix had none of her own to answer the description; *Walker v. Mackie* (a); *Mackinley v. Sison* (b); *Elliott v. Elliott* (c); *Lake v. Currie* (d); *Sugden on Powers* (e); and see *Shelford v. Ackland* (f).

Mr. *W. Barber* for the trustees.

[*The MASTER of the ROLLS.* I am of opinion that, in default of appointment, the fund is divisible amongst the four children and their representatives in fourths. As to the testatrix's power to appoint to the two survivors, there can be no doubt of it.]

Mr. *Everitt* for the representatives of the two deceased children. This will was not an execution of the power. The distinction between property and power is perfectly settled

(a) 4 *Russ.* 76.
 (b) 8 *Sim.* 561.
 (c) 15 *Sim.* 321.

(d) 2 *De G., M. & G.* 536.
 (e) *Pages* 312, 343 (8th edit.).
 (f) 23 *Beav.* 10.

1865.

Is re
 GRATWICK'S
 SETTLEMENT.

settled and established; *Evans v. Evans* (a). Here there is no reference either to the property or to the power, and the will is not that of a married woman, in which case it might be inferred that she must be dealing under some special power or authority. A general bequest, like the present, of "all monies belonging to her in £3 per Cent. Consols" and money she might die possessed of, is not an execution of a power of appointment. It is evident, also, that the testatrix herself did not consider she was dealing with the settled property, for she speaks of it as money she was entitled to, and she makes a son's widow, who was not an object of the power, an appointee under it. It is evident from this that she was dealing with a fund which she thought she could give to his widow. The *onus* of proof lies on the Petitioners, and they have shewn no intention on the part of the testatrix to execute this power; *Rooke v. Rooke* (b).

The MASTER of the ROLLS.

I think that this will was a perfectly good execution of the power as regards the children. The testatrix had no stock, except her interest in this sum of 300*l.* Consols, which she had power to appoint by will, and the dividends on which she had been regularly receiving under a power of attorney. She bequeathed as follows:—"I give all money belonging to me in the £3 per Cent. Consols," &c. I am of opinion that the inference is irresistible, that she applied these words to the stock of which she was receiving the dividends, and that no other construction is possible.

I am of opinion that the appointment is good in favour of her two children, and that the one-third intended for the widow of the son goes between the four children as unappointed.

(a) 23 *Beav.* 1.

(b) 2 *Drew. & Sm.* 38.

Re BLITHMAN.

THE question raised on this petition was, whether some personal property in *England*, belonging to an insolvent residing in *South Australia*, passed to the official assignee of such insolvent or to the executrix of the insolvent, who had since died.

A testatrix died in 1837, having bequeathed her residue to Mrs. *Henwood*, *durante viduitate*, and after her death or marriage, upon trust for her children, equally, as and when they should respectively attain the age of twenty-five years, with benefit of survivorship.

George Henwood, one of such children, and a domiciled English subject, went to *South Australia* previous to the year 1863, and he resided there for some time, and carried on business there. In 1863, he was duly judged insolvent in *South Australia*, under the Insolvent Act, No. 16, of 1860. By that act, when any person is adjudged an insolvent, all his personal estate, present or future, before certificate, becomes absolutely vested in his assignees, by virtue of his appointment, and such assignees alone have power to recover the same in their own names. The insolvent executed a conveyance of his real estate to his assignees, but he did nothing to affect his personal estate.

Mrs. *Henwood*, the tenant for life, died in *November*, 1864, after the insolvency, and *George Henwood* died in *South Australia* on the 22nd of *January*, 1864. His wife was his sole executrix in *England* and his uni-

1865.

Dec. 16.

1866.

Jan. 17.

A. B. was adjudged insolvent under an act of the Australian legislature, which enacts, that the personal property of insolvents shall vest in their assignees by virtue of their appointment.

No assignment was executed by *A. B.* He was entitled to a share of a residue consisting of a sum of stock in the Court of Chancery in *England*. The fund was claimed by the assignees, and by the executrix of *A. B.* in *England*.

Held, that the right to receive it depended on the domicile of *A. B.*; that if he were domiciled in *Australia*, his assignees were entitled to receive it; but if in *England*, his executrix was entitled.

versal

1865.

Re
BLITHMAN.

versal legatee; and the share of *George Henwood* in the residue (425*l.* stock) having been paid into Court, under the Trustee Relief Act, she presented this petition for payment of it to her. This was resisted by the assignees in insolvency of her husband, who claimed to be entitled to the money under the Australian insolvency.

Mr. Baggallay and *Mr. Horsey* for the English executrix. The act of the colonial legislature could not operate on property in a foreign country and out of its jurisdiction. Some limit must necessarily be placed on the acts on the subject, 4 & 5 *Will.* 4, c. 98, s. 2; 1 & 2 *Vict.* c. 60, s. 59; 28 & 29 *Vict.* c. 63; 23 & 24 *Vict.* c. 16 (Colonial Act), and their operation must be confined to property within the jurisdiction and power of the colonial legislature. According to the law of *England*, this fund could only pass by transfer or by some instrument executed by the owner. No act of the colonial legislature could make it vest in any other person without some act done, by the rightful owner, which can be recognized in this country, and in this case, the insolvent has done no act whatever to affect his personal estate here. If, therefore, it be necessary that there should have been some act binding on the insolvent which passed the property, then it becomes a question of domicile, and his domicile was always that of his origin, namely, in *England*, for no change in it has been proved to have taken place.

Secondly, the discharge under an Australian insolvency would not have discharged him from his debts in *England*; *Bartley v. Hodges* (a); *Smith v. Buchanan*;

(a) 1 *Best & Smith*, 375.

Buchanan (a); *Solomon v. Ross (b)*; *The Royal Bank of Scotland v. Cuthbert (c)*. If the insolvency in *Australia* cannot be pleaded in bar here, neither can his property here vest in the assignee; for the discharge from all his debts is the condition on which an insolvent gives up all his property to his creditors. If it were otherwise, he would be liable here for his debts, though all the means of paying them had been taken from him by his creditors.

1865.
Re
BLITHMAN.

They also referred to *Townsend v. Early (d)*.

Mr. *Murtelli* for the assignees. The property in question passed under the Australian insolvency; *Solomons v. Ross (b)*; *Sill v. Worswick (e)*; *Stein's Case (f)*; *Potter v. Brown (g)*; *Selkrig v. Davies (h)*; *Ex parte Cridland (i)*. .

Secondly, the domicile of the insolvent was in *Australia*, where he resided and carried on his trade; *Jopp v. Wood (k)*; *Bempde v. Johnstone (l)*.

The adjudication in insolvency is equivalent to the judgment of a foreign court, which, by the comity of nations, the courts of foreign countries will give effect to; *Kent's Commentaries*; *Story on Conflict of Laws*; *Wheaton*; and *Westlake*.

Mr. *Bristowe* for trustees.

Mr. *Baggallay*, in reply, cited *Lord v. Colvin (m)*.

The

- (a) 1 *East*, 6.
(b) 1 *H. Bl.* 131, n.
(c) 1 *Rose*, 462.
(d) 34 *Beav.* 23.
(e) 1 *H. Bl.* p. 691.
(f) 1 *Rose*, 262.
(g) 5 *East*, 124.

- (h) 2 *Rose*, 97, 291.
(i) 3 *Ves. & B.* 94.
(k) 34 *Beav.* 88.
(l) 3 *Ves.* 198, 201.
(m) 4 *Drew.* 366, and 10 *H. of L. Cas.* 272.

1866.

Re
BLITHMAN.
Jan. 17.

The MASTER of the ROLLS.

I am of opinion, on examining the cases, that the question as to the hand to receive this money is one which depends on the domicile of *George Henwood*. If his domicile was Australian, I think the property passed to his assignees; but if the domicile, at the time of his death, was English, then his legal personal representative is the person entitled to receive the personal estate belonging to him in this country.

It was argued, that, if the domicile were English, still, nevertheless, that, on the principle of the comity of nations, this insolvency was in the nature of a foreign judgment, and that this Court would give effect to it against the property in this country, and several cases were cited for that proposition. I am disposed to assent to that argument, but with this qualification:—I think that the legal personal representative would be entitled to receive the money, and that the assignees can only obtain payment here by suing for the amount as in an ordinary case. If a person domiciled in this country had, in his lifetime, contracted debts abroad, for which a foreign judgment had been obtained, the judgment creditor might sue the legal personal representative in this country, for the purpose of recovering his debt; but various questions might then arise between different classes of creditors, such as whether he was or was not entitled to take the whole of the fund, or questions of priority, and whether the other judgment creditors of the deceased were not entitled to share in the assets *pari passu*.

I am of opinion, assuming that the domicile was English, that the money ought to be paid to the Petitioner, and it will then be for the assignees to take such steps

steps against her as they may think fit and proper, and I would allow them time for that purpose. But if the domicile of *George Henwood* was Australian, then I think that the property in this country passed to and vested in the assignees immediately, under the provisions of the act of *South Australia* already referred to.

1866.

 Re
 BLITHMAN.

As I think the question depends on the domicile, I cannot determine it, unless both parties admit that there is no further evidence. But, on the meagre evidence before me, I am bound to say, that I should not consider that there was sufficient to shew any change of the domicile of origin.

THE NORWEGIAN TITANIC IRON COMPANY
 (LIMITED).

THIS company had been registered in *October*, 1863, and its objects as stated in the articles of association were:—

“The purchase of certain leasehold collieries situate at *Neville Hills*,” in *Yorkshire*, and “of certain mines and mining rights” in *Norway*, the working of the coal in the collieries at *Neville Hills*, and of the iron ore in the said mines in *Norway*, the conveyance of such coal and iron ore to and from *Norway*, and *Neville Hills* and elsewhere in *England*, and the smelting of such iron ore, and of other ore necessary to be mixed therewith, at either or both places or elsewhere, by means of such coal and of coke to be made therefrom, and of other coal and coke; the manufacturing and sale of the iron so to be made, and of such other coal, coke, clay, bricks, and doing

1865.
 Nov. 25.

It is not an abandonment of the objects of a company if, where, being established for three or four purposes, it abandons one and carries on the others; provided such abandonment does not alter the fundamental principle of the company.

1865.

THE
NORWEGIAN
TITANIC
IRON CO.
LIMITED.

doing acts incidental to the attainment of these objects, and to the selling the iron, iron ore, coal and coke.

Mr. *Holdforth* was the holder of seventy shares in the company; he died in 1864, and his executrix presented this petition for winding up the company. She founded her application on various grounds which failed; but one of them was as follows:—

The directors had thought it best to sell the leasehold colliery at *Neville Hills* (valued at 25,000*l.*), to pay off the debts and to provide capital for their works in *Norway*. It had originally been intended to smelt the *Norway* iron with the coal of the English colliery; but the directors had been advised that it would smelt better in combination with other ore, and they decided upon selling the colliery and retaining the *Norway* mines.

Mr. *Jessel* and Mr. *Jones Bateman*, in support of the petition, argued that the company had failed to realize the objects for which it had been formed; that it had no funds for carrying on the business, and that, by the intended sale of the *Neville Hill* property, the objects of the company had been varied by the abandonment of one of them.

They referred to *Bengal Tea Company* (a); *Wheal Lovell Mine* (b).

The MASTER of the ROLLS.

I do not think that this is a case for winding up the company. The Court holds it to be the right of every shareholder in a limited company to have any surplus divided

(a) *Master of the Rolls*, 9th March, 1864. (b) 1 Mac. & Gor. 1.

divided, but that is only where the business of the company cannot be carried on. The only question is, whether the company has abandoned the object for which it was formed. The Court must see whether the company is carrying into effect the objects stated in the memorandum of association; these the directors cannot alter. Then, is the sale of the leaseholds at *Neville Hill* an abandonment of the objects of the company? I am of opinion that it is not an abandonment of the object of a company if, when established to accomplish three or four, it abandons one and carries on the others, provided such abandonment does not alter the fundamental principle of the company, and that such a change does not justify a shareholder in coming to the Court, and saying the company has abandoned its object.

Here are two objects, and the principal of which was to be effected by the outlay of a large part of the assets in *Norway*. If so, these fourteen persons, who united together as shareholders, must have intended that the *Neville Hill* collieries should be ancillary to the working of the minerals in *Norway*. If they abandon the working of the colliery, it is not abandonment of the fundamental objects for which the company was established.

I think this is not a proper case to come for a winding up order, and I must dismiss the petition with costs.

1865.

THE
NORWEGIAN
TITANIC
IRON CO.
LIMITED.

1865.

THE VESTRY OF THE PARISH OF BER-
MONDSEY v. BROWN.

Nov. 23.
Dec. 7.

A vestry was empowered, by act of parliament, to indict any person who should stop or impede rights of way in the parish, and to take such other proceedings for opening thereof as should appear expedient. *Held*, that the vestry must indict in the name of the Queen, and sue in equity in the name of the Attorney-General, and that they could not proceed in their own name.

A dedication to a parish of a right of way cannot be presumed; a dedication can only be presumed, from uninterrupted use, in favor of the public generally, and not in favor of a portion of the public, as of the inhabitants of a parish.

THIS suit was instituted by the *Bermondsey* vestry, to restrain the Defendant from building an archway over a passage called "*The Ten Foot Way*," leading from *Bermondsey Wall* to the river *Thames*, and which archway was intended to unite the Plaintiff's warehouses on each side of the way. The vestry insisted, that "*The Ten Foot Way*" was a public highway, and had been enjoyed by the public for nearly forty years. The Defendant, on the other hand, insisted, that it was a private road belonging to the estate of a family named *West*.

However, the evidence of the Defendant established, that down to 1845, it was a private road belonging to the owner of the *West* estate, and, upon the evidence of the Plaintiffs, it was established that since that time the public had no right to use it. In 1845, the vestry claimed this way as being the property of the parish, as opposed to and distinct from any dedication to the public. Accordingly, in that year, they put up a board by the side of the way, with this inscription upon it:—

"*Free landing place, belonging to the parish of Bermondsey.*"


"*George Henry Drew,*

"*Clerk of the Vestry.*"

The acts of parliament on which the Plaintiffs relied, as giving them a power to sue irrespective of the Attorney-General, were as follows:—

The 57 *Geo.* 3, c. xxix (local and personal), s. 72,

gives authority to commissioners "to regulate or remove" projections from the sides of any house, which are inconvenient to any passengers along the carriage or footways of any streets.

1865.

 VESTRY OF
 BERMONDSEY
 v.
 BROWN.

8 & 9 Vict. c. clxxvii. (local and personal), s. 165, gives authority to commissioners to indict any person who should stop or impede the landing places or rights of way [in the parish of *St. Mary, Bermondsey*], and to take such other proceedings for the opening thereof as should appear to the commissioners expedient.

By the Metropolitan Local Management Act, 18 & 19 Vict. c. 120, s. 96, vestries are to execute the office of surveyor of highways, and all streets, being highways, are placed under their control. The 119th section empowers vestries to remove any projection or obstruction rendering less commodious the passage along any street in their parish.

This act was amended by the 19 & 20 Vict. c. 112, and the 25 & 26 Vict. c. 102.

Mr. *Hobhouse* and Mr. *Surrage* for the Plaintiffs. First. There has been a long user, from which a dedication to the public may be presumed; *Rugby Charity v. Merryweather* (a); *Woodyer v. Hadden* (b); *Rex v. Lloyd* (c); *Rex v. Inhabitants of Leake* (d); *Reg. v. Inhabitants of East Mark* (e); *Reg. v. Petrie* (f). Secondly. The acts of parliament give the vestry a right to sue irrespective of the Attorney-General. The soil is in them, and they are made custodians of the public roads

(a) 11 *East*, 375.
 (b) 5 *Taunt.* 125.
 (c) 1 *Camp.* 260.

(d) 5 *B. & Adol.* 469.
 (e) 11 *Q. B.* 877.
 (f) 4 *El. & B.* 737.

CASES IN CHANCERY.

1865.

VESTRY OF
BERMONDSEY
v.
BROWN.

roads, and are authorized to indict and to take such other proceedings for opening the ways as may appear to them expedient; 28 & 29 Vict. c. 75, s. 10.

Mr. Selwyn, Mr. Mellish and Mr. Wickens for the Defendant. First. There has been no dedication to the public; *Wood v. Veal* (a); *Jarvis v. Dean* (b); *Daniel v. North* (c). The Plaintiffs' present claim, in right of the public, is quite inconsistent with their claim since 1845, "belonging to the parish of *Bermondsey*," and not to the public generally. They have always insisted on the right of way as a dedication of a right of way to a parish; *Poole v. Huskinson* (d); it would be simply a grant, and must be by deed. After the leases to *Creak* and *Rattenbury* the owner had no right to dedicate the road to the public in derogation of his grant to the tenants.

Secondly. If this be, as contended, a public right, the Attorney-General alone can sue in respect of it.

Fisher v. Prowse (e) was also cited.


Mr. Hobhouse in reply. The 57 Geo. 3, c. xxix. s. 72, gives the vestry the power to remove obstructions; and, if so, they are entitled to come into this Court to enforce that right.

The MASTER of the ROLLS.


Dec. 7. This suit is instituted to compel the Defendant to remove an arch and building which he has erected on a certain road.

(d) 11 Mee. & W. 827.
(e) 2 Best & Sm. 770.

a. certain passage from the street, called *Bermondsey Wall*, to the river *Thames*, called *The Ten Foot Way*. The Plaintiffs insist that this is a public way, whereas the Defendant insists that it belongs to the estate in *Bermondsey* formerly known by the name of Mrs. *West's* estate.

1865.

 VESTRY OF
 BERMONDSEY
 v.
 BROWN.

The difficulty in the way of the Plaintiffs in this case struck me early in the course of Mr. *Hobhouse's* argument, viz. that if this way is claimed as a public way, the suit ought to have been instituted, by way of information, by her Majesty's Attorney-General. This difficulty had been previously felt by Mr. *Hobhouse*, who endeavoured to overcome it by referring to the various local and public acts which relate to this matter, and especially to the 165th section of the 8 & 9 *Vict. c. clxxvii*, which is the local act for improving the parish of *Bermondsey*, and which enables the commissioners thereby appointed to make and enforce rules for the use and maintenance of landing places, and for indicting persons who stop up or impede the same, and this, Mr. *Hobhouse* contended, when combined with the 18 & 19 *Vict. c. 120*, which is an act for the better local management of the metropolis, together with the act passed, 21 & 22 *Vict. c. 104*, to amend that act, made the vestry of *Bermondsey* the guardians or custodians of the rights of way, and enabled them, in their own names, to sue or prosecute any person who should impede or destroy any of such rights of way. I thought, at the time, and further examination of the act of parliament has confirmed me in that view, that it was not intended, by these acts or by any clauses to be found in them, to delegate to the commissioners named in the first act, or to the vestry who have now vested in them the powers possessed by the commissioners, any power or authority which was previously vested in the Attorney-General,
 and

1865.

 VESTRY OF
 BERMONDSEY
 v.
 BROWN.

and that accordingly, if the vestry indict any one under that act, they must proceed in the name of the Queen before a grand jury, who must find the bill before it can be tried; and if they apply to chancery on behalf of the public, they must do so in the name of the Attorney-General at their relation and with his sanction.

As, however, I was very desirous not to determine the question between the parties on any ground founded on the frame of the suit, which might lead to another being instituted, I determined to hear and consider the case, as if it had been brought before me in the shape of an information filed by her Majesty's Attorney-General, at the relation of the vestry of the parish of *Bermondsey*. This I have accordingly done, and, after reading and examining all the evidence, I find that almost the whole of the evidence, on both sides, both for the Plaintiff as well as that for the Defendant, negatives the position that this *Ten Foot Way* was ever dedicated to the public; and that what little evidence there is, which is not of this character, but is in favour of a general use by the public, is consistent with the opposing evidence, or is explained and overpowered by the evidence negating the public right. This will, I think, appear manifest by a short recapitulation of the history of this *Ten Foot Way*, and the evidence relating to it.

Up to the year 1814, this way had no existence, the place where it now is was covered with buildings. It seems, as far as I can judge, to have been created in 1818, by the *Wests*, for the benefit of their tenants. It is first mentioned in a lease for eighty years to *Creak*, in *October*, 1818, where the right to use the way is included in his demise granted by the owners of Mrs. *West's* estate in *Bermondsey*. This lease is still subsisting,

sisting, and will continue, unless merged, till 1898. The next mention of it is in a lease for fifty-one years, granted, under a power, in 1821 by Mr. *West*, the tenant for life of the estate, to *William Rattenbury*, which lease contains a power to him to build over this way, provided the breadth of it be allowed to remain ten feet and the height nine feet. These leases negative any dedication to the public at that time.

1865:

VESTRY OF
BERMONDSEY
v.
BROWN.

The general user of this *Ten Foot Way* by various persons is proved, I think, since 1818 till the present time, subject to the observations I am about to make; but whether it has been used by any other than the tenants of the *West* estate, or, if so, by any persons other than inhabitants of the parish of *Bermondsey*, is nowhere made clear. As long, therefore, as the lease of 1821, which gave authority to build over it, was in existence, no dedication from use could be presumed against the owner of the property. In *July*, 1845, however, this lease was merged in the inheritance, and it is contended by the Plaintiff, that since then there has been a constant user by the public, from whence this dedication is to be presumed. But the evidence given on behalf of the Plaintiffs themselves repudiates all inference of that character, for, in the same year, viz., 1845, when the lease to *Rattenbury* was merged in the inheritance, the Plaintiffs, the vestry, claimed the way as being the property of the parish, as opposed to and distinct from any dedication to the public. Accordingly, in that year, they put up a board by the side of the way with this inscription upon it:—

"Free landing-way, belonging to the Parish of Bermondsey.

"Geo. Hy. Drew,

"Clerk to the Vestry."

This,

1865.

VESTRY OF
BERMONDSEY
v.
BROWN.

This, it is obvious, is a claim of the way as of a property belonging to the parish, and a repudiation of the right of the public to use it. This board has continued up to the time of filing this bill, and so long has the vestry claimed the property as the exclusive right of the parish. If this evidence were ambiguous, the ambiguity is removed by the records of the Plaintiffs themselves, for so solicitous was the parish that "*The Ten Foot Way*" should be considered as the property of the parish and open to parishioners only, excluding the rest of the public, that, in the same year, the surveyor of the parish, under the authority of the vestry, given on the 14th *October*, 1845, repaired the posts and rails before "*The Ten Foot Way*," and provided locks and keys, to be placed with some housekeeper residing near the way, in order to secure that the use of the way should be confined to the inhabitants of the parish, and this order was repeated in the following month of *December*.

Mr. *Riches*' affidavit, which is precise on this point, is conclusive against any admission of the right of the public to use the way, and confines the use of it to the inhabitants of the parish. It is true that there is evidence that from 1818 it was open, and that till 1845 it was generally used, and probably by any one that pleased to do so, because no one inquired whether the person using it was a tenant of the *West* estate, or a stranger; but during all that time to 1845, the leases negative any dedication to the public, and since that year, 1845, the evidence of the Plaintiffs negatives it. The evidence of the Defendant establishes that up to 1845 it was a private right belonging to the owner of the *West* estate, and since that time, the evidence of the Plaintiffs insist that the public had no right to it, but that the use of it was claimed by the parish of *Bermondsey*, as a private right belonging to the parish,
and

and to be used by parishioners alone. And, indeed, it seems to me as if the same feeling was now prevalent in the vestry, and that this explains why they alone are the Plaintiffs, and not the Attorney-General on behalf of the public.

1865.

VESTRY OF
BERMONDSEY
v.
BROWN.

Now I certainly do not doubt that a parish might possess, as private property belonging to the parish, such a right of way as this *Ten Foot Way*, just as they might possess a field; but, if so, it must be by grant from the owner of it; neither do I doubt that after continuous user from time immemorial by parishioners, and confined strictly to parishioners alone, such a grant would, in the absence of any contrary evidence, be presumed. But a dedication to a parish, by the owner of the soil, of a right of way cannot be presumed; a dedication, to be presumed from uninterrupted use, can only be presumed in favor of the public generally, and not in favor of a portion of the public, as the inhabitants of the parish. This is laid down in *Poole v. Huskinson (a)*, and is unquestionable law. That case also established, not only that no such dedication can be presumed, but that if actually made, it is simply void. That case is important in other respects also, it shews that, to constitute a dedication to the public by the owner of the soil, there must be an intention to dedicate on his part, and that this must not be rebutted by evidence of interruption by the owner. Here the intention to dedicate is negatived down to 1845, by the existence of *Rattenbury's* lease, it is negatived also by the contents of *Creak's* lease, which is still subsisting; the right claimed is further rebutted by the fact, that since 1845 the public have not used the footway, inasmuch as the Plaintiffs themselves have

(a) 11 *Mees. & W.* 827.

1865.

VESTRY OF
BERMONDSEY
v.
BROWN.

have prevented the public, not being inhabitants of the parish of *Bermondsey*, from so using it, and have set up a claim for it, both in their books and by their acts, as being the private property of the parish.

The Defendant has built over it, but, in doing so, he has preserved the limits pointed out by the lease to *Rattenbury*; so doing he was entitled to build as he has done. This suit, on the part of the vestry, wholly fails on the merits, besides being defective in the frame of it.

The bill must, therefore, be dismissed with costs.

1866.

Jan. 13, 17.

A tenant for life of a real estate bequeathed all money due to him on mortgage:—*Held*, that a charge on the estate of 10,000*l.*, to which the testator was entitled and which was secured by means of a term vested in a trustee, did not pass as a mortgage.

A tenant for life directed his

executors to pay, out of a particular fund, his pecuniary legacies and annuities, "and the legacy and succession duty payable for the same or in consequence of his death:"—*Held*, that the succession duty payable by the next remainderman, under a prior settlement and in respect of family estates not devised, was charged on the fund.

EARL POULETT v. HOOD.

THE testator *John Earl Poulett*, amongst other things, bequeathed as follows:—

"Also I give and bequeath to *A. N. Hood* and *W. Speke*, all monies and stock which I may have or be entitled to, at the time of my decease, in any of the public stocks or funds of *Great Britain*, and all money which, at the time of my decease, shall be due or owing to me on mortgage from any person or persons whomsoever, and also all money which, at the time of my death, shall be due or owing to me from Messrs. *Coutts & Co.*, Bankers, *London*, Messrs. *Child & Co.*, Bankers, *London*,

London, or Stuckey's Banking Company, or any person or persons whomsoever (except the said rents), upon trust that they, my said trustees or trustee, do and shall, thereout, pay the said several pecuniary legacies and annuities by me hereinbefore given, and the legacy and succession duty payable for the same or in consequence of my death, and all my just debts and funeral and testamentary expenses." He directed the surplus to be invested in real estates to be settled upon the same trusts as thereinbefore expressed and declared respecting his residuary and real estate, thereinbefore devised by him in strict settlement. And he bequeathed all the residue of his personal estate to his executors, upon trust and for the benefit of his nephew, the Plaintiff. He appointed the Defendants *A. N. Hood* and *W. Speke* executors in trust of his will.

1866.

 EARL
 POULETT
 v.
 HOOD.

The testator died on the 20th of *June*, 1864.

The questions now arising upon the testator's will related to his interest in two sums of 7,000*l.* and the two sums of 10,000*l.* each, charged upon the family estates, and to the succession duty payable in performance of the above trust.

These questions depended on the following circumstances, in regard to the position of the testator's property:—

The testator was tenant for life of large family estates in *Devonshire*. He was also entitled, as representing two deceased sons, to two portions of 10,000*l.* each, raisable on his death and charged on the same estates. These were secured by a term of 1,500 years, vested in trustees in trust to raise them "by demise, sale or mortgage."

The

1866.

EARL
POULETT
v.
HOOD.

The testator was also entitled, absolutely, to the fortune of his wife (who was still living), subject to her life interest therein. This consisted of a sum of 7,000*l.*, which had been lent to the testator and was secured on a charge on the *Devonshire* estates, to which charge the testator was absolutely entitled and was made redeemable. This charge was secured by another term of 500 years, vested in trustees.

The testator was entitled, in his own right, to a mortgage in fee of some property in *Somersetshire*.

The Plaintiff (*William Henry Earl Poulett*) insisted, that the two portions of 10,000*l.* passed to him as part of the testator's residuary estate, and that it did not come within the specific bequest of money owing "to me on mortgage."

The Plaintiff also insisted, that the 7,000*l.* charged on the *Devonshire* estates and assigned to secure the fortune of the testator's wife, also formed part of the testator's residuary estate, and was not comprised within the bequest of money due on mortgage.

Sir *R. Palmer* (Attorney-General) and Mr. *Fuber* for the Plaintiff. These sums of 10,000*l.*, 10,000*l.* and 7,000*l.* pass under the residuary bequest, and not under the specific gift of money, at the time of his death, due to the testator on mortgage from any person whatsoever. The two sums of 10,000*l.* were charges on the family estates, but they were in no sense mortgages. Mortgages and charges are quite distinct in their nature and incidents. A mortgage is a debt due from the mortgagor, and the mortgagee is a person to whom the estate has been conveyed and which he holds until payment, upon which he is bound to restore it and be redeemed.

One

One of the remedies of a mortgagee is by ejecting and entry. But a person having a charge has no right to the possession of the estate or to foreclose, all he can do is, to require his trustee to raise the charge by sale or mortgage; and then the person who advances the money, and not the trustee or the owner of the charge, becomes the mortgagee; he it is to whom the money is due and owing on the mortgage, and who alone is entitled to a mortgagee's remedies, and can be redeemed. A charge is no debt at all, but an interest carved out of the estate, or an aliquot portion of the beneficial interest in the property itself, raisable out of it but not due "from any person or persons whomsoever." Again, these two sums were not due and owing to the testator "at the time of his death;" they became due afterwards, and were subject to the debts of the sons.

1866.

EARL
POULETT
v.
HOOD.

The same objections apply to the 7,000*l.* charge on the estate which the testator has mortgaged to secure his wife's fortune, and of which the testator was therefore mortgagor, and not mortgagee. They cited *Taylor v. Lord Harewood* (a); *Gardiner v. Jellicoe* (b).

Mr. *E. R. Turner* for the Countess *Poulett*.

Mr. *Hobhouse* and Mr. *J. Pearson*, *contra*, for the parties entitled in remainder. These charges pass under the specific gift. The scheme of the will shews that the testator intended to bequeath all monies due to him, for securing which the estates were pledged, and which, in ordinary language, are termed mortgages and include charges. The money was due to the testator, though payable through the trustee, and he was entitled

(a) 3 *Hare*, 372.and 11 *H. of L. Cas.* 323.(b) 12 *C. B. Rep.* (N. S.) 568,

1866.

 EARL
 POULETT
 v.
 HOOD.

entitled to require the trustee to execute a mortgage to him for better securing it. The owner of the estate could not get rid of the term except by redemption, and a suit to redeem would be the proper course to liberate the estate.

The money was due to the testator at his death, for the portions became vested in the sons on attaining twenty-one, although not raisable until the death of the tenant for life. Each charge was *debitum in presenti et solvendum in futuro*.

[*The MASTER of the ROLLS*. If a testator charged his real estate with debts and legacies, would the claims of all the creditors and legatees be money due on mortgage?]

Perhaps not, that security being secondary; but here the substance is the charge upon the estate. They cited *Phillips v. Eastwood* (a).

Mr. *Southgate* for the trustee of the settlement.

Sir *R. Palmer* in reply. The word mortgage must be taken in its ordinary sense; *Slingsby v. Grainger* (b). Here there is no personal charge or any one from whom it is due, and the term to raise the charge did not arise until the testator's death. It is said that this is practically a mortgage, because the owner can redeem; but the test of being a mortgage is the right to foreclosure, and to retain the estate itself if not paid. This right the owner of a charge does not possess.

The

(a) *Lloyd & G. temp. Sug.* 270.

(b) 7 *H. of L. Cas.* 273.

The MASTER of the ROLLS.

A simple statement of the circumstances will shew that the 7,000*l.* cannot come within the words of this bequest.—[His Lordship stated the facts.]—It is clear that this sum of 7,000*l.* was not a mortgage due to the testator. So far as it was a mortgage at all, it was a mortgage due from him ; he had borrowed the 9,017*l.* Consols from the trustees, and mortgaged 7,000*l.* (part of a 36,000*l.* charge) to secure it : ultimately the trusts of both properties vested in the testator absolutely. He secured the money advanced by the trustees by a mortgage ; ultimately the money so secured to the trustees became his own ; but he could not be said to owe a sum to himself. In fact, the 7,000*l.* positively disappears ; he secured it to the trustees, who in return were bound to pay it to his estate. Therefore, with respect to the 7,000*l.*, I do not think any question arises.

As to the other two sums, there is some question about them.—[His Lordship stated the circumstances relating to them.]—I think that the words of the will do not include these charges. The first observation, which occurs on it, is this :—that the words of the will do not strictly and technically include charges. The words are, money “ due or owing to me on mortgage from any person.” It is clear that this was not money due to the testator from any person on mortgage, and that there was no personal liability of any one. It was argued, that some one must be liable, because no one could get the estate without paying the charge ; but that is not so ; the charge is, in truth, a beneficial interest in the land itself.

It is, I think, important to consider the difference between the rights of a mortgagee and a person having a charge.

1866.

EARL
POULETT
v.
HOOD.
Jan. 17.

1866.

EARL
POULETT
v.
HOOD.

charge. I suggested the case of a testator who left legacies, which he charged on his real estate, and the Attorney-General added the case of a charge of debts. I asked, "would every one of the legatees or creditors be called mortgagees on the property, or could it with propriety be said that money was due to them on mortgage?" They have, it is true, a charge on the estate, and nobody can take it from them without paying them the charge; but the effect merely is, that a portion of the property is made a security for their charges.

If a perpetual annual rent-charge were payable out of the property, as in *Western v. Macdermot* (a), could any one say that the person entitled to the rent was a mortgagee of the property, or that, if he had bequeathed all money due to him on mortgage, this rent-charge would have passed? It would be impossible so to hold, and I find it impossible to distinguish between such an annual rent-charge and a gross charge of 10,000*l.*, except that one is payable annually, and the other at one fixed period.

A charge has none of the qualities of a mortgage; it is not subject to redemption or foreclosure; and if you fail in paying it, the estate would not become absolute. A charge must, first of all, be converted into a mortgage, by the institution of a suit, in which it is raised by mortgage, and you thus substitute a mortgage for a charge. That shews that a charge is not a mortgage.

I thought it important to consider whether there was, in fact, any property of the testator to which the term "mortgage" applied, because in *Phillips v. Eastwood* (b), where Lord *St. Leonards* held a policy to be a debenture, he laid stress on the circumstance of there

not

(a) *Post*, p. 243.(b) *Lloyd & G. 20.*

not being any other articles or things belonging to the testator in existence which would satisfy the words of the will. Here I find the testator had a mortgage due to him at the time of his death, and which therefore satisfies the words of the will; and although I do not think that that alone should determine the case, still I think that it is an ingredient, because it destroys this argument:—that the words would be unmeaning if not applied to a charge.

1866.

EARL
POULETT
v.
HOOD.

The only other argument is derived from the nature and scope of the will; but that argument tells both ways, and I think that there is nothing in the will to shew the necessity of doing any violence to the words used, which naturally import and are confined to a mortgage, and do not extend beyond it.

I do not mean to give any opinion upon the construction of the word “mortgage” as used in *Locke King’s Act* (17 & 18 Vict. c. 115).

I am of opinion that the 7,000*l.*, 7,000*l.* and 10,000*l.* did not pass under the word “mortgage,” but under the residuary clause.

Another question arose in this case under the following circumstances:—

The testator, *John Earl Poulett*, was merely tenant for life of the family estates, which, upon his death, in 1864, descended on his nephew the Plaintiff *William Henry Earl Poulett* as tenant for life, by virtue of a resettlement of the estates made in 1853, to which the testator was a party.

The testator, by his will, desired the trustee to pay
VOL. XXXV—II. R legacies

1866.

~
EAST
POULERT
v.
HOOD.

legacies and annuities "and the legacy and succession duty payable for the same *or in consequence of his death*," and all just debts, &c.

The Plaintiff insisted, that the trust for payment of the legacy and succession duty payable upon his pecuniary legacies and annuities, or in consequence of his death, out of the funds therein mentioned, extended to the payment of the succession duty chargeable against the Plaintiff, as well in respect of his life interest in the estates comprised in the said settlement of 1853, to which the Plaintiff succeeded under the limitations of that settlement upon the death of the testator, as in respect of the estates for life and in fee in the hereditaments and premises devised to him by the will of the testator.

Sir *R. Palmer* and Mr. *Faber* for the Plaintiff. The testator has exonerated the family settled estates from paying the succession duty; the words are distinct, and the succession duty became payable in consequence of his death.

Mr. *Hobhouse* and Mr. *Pearson*, *contra*. The expression, payable in consequence of his death, must have some limit. If the estate had gone over to a stranger, instead of to the testator's nephew, could he possibly have intended the succession duty to fall on his own estate? It is not reasonable to impute to the testator an intention of paying the duty on anything but what he disposed of by his will.


Sir *R. Palmer* in reply. The case of a stranger is imaginary; here the testator himself created the succession by the settlement and he therefore knew of it.

The

The MASTER of the ROLLS.

As to the succession duty, I think it is payable out of the fund, for if I did not so hold, I must strike the words "in consequence of my death" out of the will. Why must I strike out these words? The testator directs the succession duty payable for the legacies and annuities. If he intended that only, why did he not stop there; he need not go further? But he proceeds "or in consequence of my death." It involves the whole of the property under the will or otherwise on succeeding to the estates.

The words are perfectly plain and distinct and must have their natural meaning, and I must hold that all the legacy and succession duty is payable out of the fund.

1866.

 EARL
 POULETT
 v.
 HOOD.
 Jan. 17.

WESTERN v. MACDERMOT.

THE Plaintiff and Defendant were respectively the owners of two houses, numbered 10 and 9, fronting towards *Brock Street*, in the city of *Bath*, and with gardens at the back or south side. They both overlooked, on the garden side and towards the south, *Victoria Park*, formerly called *King's Mead Furlong*.

1865.
 Dec. 6, 7.
 1866.
 Jan. 12.

If the owner of one of several houses throws out a bow in the rear, of the depth of eight feet (the whole space opposite being open),

In his next door neighbour

cannot, on the ground of an interference with his ancient lights, prevent it. But it would be a sufficient injury, if contrary to an express covenant, to induce the Court to interfere.

A. conveys a plot of land to *B.* in fee, and remains owner in fee of an adjoining plot. *A.* and *B.* for themselves, their heirs and assigns enter into reciprocal covenants against building on their respective plots:—*Held* that, whether these covenants run with the land or not, all persons claiming under *A.* or *B.* are bound by the covenants.

This Court will not interfere in the case of a mere nominal breach of covenant.

Acquiescence in one breach of covenant, not considered material, will not prevent the covenantee complaining of another breach which affects the value of his property.

1865.
 ~~~~~  
 WESTERN  
 v.  
 MACDERMOT.

In *July*, 1864, the Defendant *Macdermot* commenced erecting, at the back of his house, No. 9, a circular bow or projection, which extended towards the garden about eighteen feet from the back walls of the line of houses, and which was intended to be raised from the basement to the attics. The Plaintiff, his next door neighbour, conceiving this to be an infringement on his rights, instituted this suit, in *August*, 1864, to prevent his proceeding in the alteration of the back of his house. The Plaintiff insisted that the proposed building would obstruct the access of light and air to his house; and he also insisted, that such a building would be a violation of contracts entered into by previous owners, and by which the Defendant was bound. The title both of the Plaintiff and Defendant was derived from one common source, in the following manner:—

By indentures of the 20th of *December*, 1866, Sir *Benet Garrard* conveyed to *John Wood*, in fee, a plot of ground on which *Brock Street* was afterwards built, reserving a perpetual rent-charge of 220*l.* *Wood* covenanted to erect the houses, and Sir *Benet Garrard*, for himself, his heirs and assigns, covenanted with *Wood*, his heirs and assigns, not to erect any building on *King's Mead Furlong*, or to allow any trees thereon exceeding eight feet high.

By indenture of the 15th and 16th of *May*, 1767, *John Wood* and Sir *Benet Garrard* granted the house No. 9, and the garden, &c., to *John Freeman*, in fee, subject to an apportioned ground rent of 8*l.* 8*s.* payable to Sir *Benet Garrard*. And *Freeman*, for himself, his heirs and assigns (amongst other things), covenanted with Sir *Benet* and *Wood*, and each of them, their and each of their heirs and assigns, that the garden wall, on the south, should not exceed the level of the parlour floor, “and that there should be no trees nor any  
 buildings

buildings whatever in the garden that should exceed that height." Sir *Benet*, on his part, covenanted not to allow any building on the *King's Mead Furlong*.

1865.  
WESTERN  
v.  
MACDERMOT.

By mesne conveyances, No. 9 became vested in the Defendant *Macdermot*.

By an indenture of the 23rd of *May*, 1767, Sir *Benet Garrard* and *Wood* conveyed to *Rodburn*, in fee, the adjoining house, No. 10, *mutatis mutandis*, in the same form, and they and *Rodburn* entered into covenants with each other in the same form as those in the conveyance to *Freeman*.

By mesne conveyances, No. 10 became vested in the Plaintiff *Western*.

The rent charge of 8*l.* 8*s.* payable in respect of No. 9 was now vested in the Defendant *Tite*, he, however, did not object to the Defendant's proceeding, and was made a Defendant.

It is necessary to state another circumstance, which was relied on by the Defendant *Macdermot*, which was, that, in the Plaintiff's garden, there were trees above the prescribed height, but they had all (except a mulberry tree) been reduced, from time to time, within the prescribed height. [See this stated more fully in the judgment, *post*, page 254.]

The cause now came on for hearing.

Mr. *Hobhouse* and Mr. *Haddon* for the Plaintiff. The Plaintiff is entitled to relief, first, on the ground that the building which the Defendant is erecting will interfere

1865.

WESTERN

v.

MACDERMOT.

interfere with the Plaintiff's easement and obstruct his ancient lights and the air.

Secondly, on the ground of contract, for the covenant of *Freeman* runs with the land and binds all those claiming under him. *Freeman* covenanted with *Wood* and his assigns, and the Plaintiff is, as assignee of *Wood*, entitled to the benefit of the covenant. The covenantee has, with the house, assigned the benefit of the covenant; *Child v. Douglas* (a). Even if the covenant does not run with the land, and if there be no privity between the parties, still the Plaintiff is entitled to relief; *Tulk v. Moxhay* (b); *The Duke of Bedford v. The Trustees of the British Museum* (c); *Kemp v. Sober* (d).

Mr. *Selwyn* and Mr. *C. Hall* for the Defendant. There must be some substantial damage to induce the Court to interfere; *Elmhurst v. Spencer* (e); *Attorney-General v. Sheffield Gas Consumers' Company* (f); and none has been proved. The effect of a bay-window to the next house is too trivial to speak of; it may slightly interfere with the view, and enable persons to overlook their neighbours' gardens, or slightly obstruct the side view, but these are matters as to which this Court has never, as yet, interfered; *Clarke v. Clarke* (g); *Durrell v. Pritchard* (h).

Secondly. There is no contract or privity between the parties to this suit. To entitle the Plaintiff to relief, he must claim under some covenant running with the land, and he must represent the covenantor. Here there is no reversion, and Mr. *Tite* represents Sir *Benet Garrard*,

(a) 1 *Kay*, 560.(b) 11 *Beav.* 571, and 2 *Phil.* 774.(c) 2 *Myl. & K.* 552.(d) 1 *Sim.* (N. S.) 517.(e) 2 *Mac. & G.* 45.(f) 3 *De G., M. & G.* 504.(g) 1 *Law Rep. (Ap.)* 16.(h) 13 *Law T.* 545.

*Garrard*, and assents to the alteration. Again, there was no reversion upon the conveyance in fee, and (as was said in a recent case in the Exchequer) you cannot subject a fee simple with new burthens not known to the law.

1865.  
WESTERN  
v.  
MACDERMOT.

The Plaintiff has constantly infringed the opposite covenant, by permitting trees of too great a height to grow in his garden. He, therefore, cannot now complain, having acquiesced in a deviation from the original plan; *Roper v. Williams* (a); *Child v. Douglas* (b); and he must be taken to have acquiesced in a waiver of the obligations.

Lastly, all the other owners of houses in the street are interested in this question, and the suit ought, therefore, to have been instituted on behalf of them all, *Thompson v. Hakewill* (c), in order that the question might be effectually settled in one suit.

They also referred to *Eastwood v. Lever* (d).

Mr. Haddan, in reply, cited *Whatman v. Gibson* (e), and argued that the covenants were reciprocal.

---

*The MASTER of the ROLLS.*

This suit was instituted in August, 1864, to restrain the Defendant from proceeding with a building in the rear of his house in *Brock Street*, in the city of *Bath*. The Plaintiff is the owner of No. 10 in *Brock Street*, and the Defendant is owner of No. 9. The building complained of is a bow or circular projection, extending from

1866.  
Jan. 12.

(a) *Turn. & R.* 18.

(b) 1 *Key*, 560, and 5 *De G., M. & G.* 739.

(c) 11 *Jur.* 732.

(d) 33 *Law J. (Ch.)* 355.

(e) 9 *Sim.* 196.

1866. from the basement to the attic of No. 9, the extreme  
depth of which is eight feet. It is made on the rear of  
the house No. 9, the aspect of which is south, and it  
extends into the space or garden at the rear.

WESTERN  
v.  
MACDERMOT.

No time was lost by the Plaintiff in endeavouring to stop this erection; the excavation for the building was begun in *July*, 1864, when the Plaintiff was in *Wales*; he returned on the 27th of that month, on the 1st of *August* following, he obtained from the Defendant's clerk of the works, information of what he intended to do. On the 4th of *August*, 1864, the Plaintiff caused a proper notice to desist to be served upon the Defendant, and, on the 10th of *August*, 1864, the Plaintiff filed this bill and applied for an injunction. This was heard before the Vice-Chancellor Sir *Richard T. Kindersley* on the 18th of *August*, when an arrangement was effected, by which the Defendant was allowed to continue his building, upon his entering into an undertaking with the Court to pull down the whole, or as much as the Court should direct, in case it should be of opinion that the Defendant was not justified in making the building in question.

On the undertaking being given, the building was permitted to go on, and has accordingly been completed. The case, being brought to a hearing, was fully argued before me on the 6th of last month, with very full evidence on both sides. The case, however, depends but little on the evidence; nor is the evidence, though it varies in some respect, what can be called contradictory, and even, in such parts as are not quite in unison, the evidence is illustrated and controlled or connected by several admirable photographic delineations, which have enabled me accurately to understand the extent of the inconvenience occasioned by the present erection, and  
also

also the extent of the previous violations by the Plaintiff himself of the covenant which he now seeks to enforce, and on which disregarded violation the Defendant partly relies, and to which I shall presently advert in greater detail.

1866.

WESTERN  
v.  
MACDERMOT.

This remark however may properly be made at once, in order to clear the ground for the consideration of the real question, viz. that this suit could not, in my opinion, have been maintained on the ground of obscuring ancient lights. If the owner of one of several houses in a row should throw out a bow at the rear, the extreme depth of which at the centre of the circumference is eight feet, where the whole space was open, I am of opinion that the next-door neighbour could not complain of this being such an injury to him as he was entitled to stop. But, at the same time, I am of opinion, upon the evidence, that, notwithstanding this, the injury done to the two adjoining houses is substantial. In the case of the Plaintiff it intercepts the early rays of the sun, and it also partially obstructs the view from his window, and I have no doubt that it would make his house, and the house on the other side, less preferable than the others in the row, and lower their value in the market, to an appreciable, though probably not a very considerable, extent.

The case does not therefore depend upon the doctrine of this Court relative to obscuring of ancient lights, nor indeed is it so put by the Plaintiff; his case is, that with the house he bought the benefit of a covenant, which prevented the owner of the piece of ground on which No. 9 and also all the other houses in the row are built, from making any such building as that now complained of. The original existence of such a covenant is established, and indeed is not denied; but the Defendant contends, that the Plaintiff is not entitled to claim



1866.

WESTERN

v.  
MACDERMOT.

claim the benefit of that covenant on several grounds, which I shall presently mention.

The history of the title is this:—In *December*, 1766, Sir *Benet Garrard* sold to *John Wood*, in fee, in consideration of a perpetual rent charge of 225*l.*, various parcels of land in the city of *Bath*, whereon have since been built the *Royal Crescent*, *Church Street*, *Mill Street*, the south side of *Brock Street* (in which the houses of the Plaintiff and Defendant are situated), and the gardens at the back of these houses, and also a piece of land adjoining thereto, which now is a portion of *Victoria Park*, with powers of distress and entry to Sir *Benet Garrard* to secure the payment of the rent charge, and Mr. *Wood* covenanted, for himself, his heirs and assigns, with Sir *Benet Garrard*, his heirs and assigns, to pay the rent charge, and also, within ten years, to build houses according to the description therein contained. The indenture then provided for the apportionment of the rent charge at four shillings per foot frontage, and the indenture also contained a covenant by Sir *Benet Garrard* to this effect:—[See *ante*, p. 244.] On the 22nd and 23rd *May*, 1767, certain other indentures of lease and release were duly executed between *John Wood* and *Thomas Brock* (who was a party to the first-mentioned indenture as *John Wood's* trustee to bar dower) of the first part, Sir *Benet Garrard* of the second part, and *Charles Redburn* and *John Fielder* (a trustee for *Charles Redburn*) of the third part. By it *John Wood* and his trustee *Thomas Brock* conveyed to *Charles Redburn* and his trustee *John Fielder* all that plot of ground now claimed by the Plaintiff.

The Plaintiff has proved his title from *Redburn*, and is now owner of the house No. 10 in *Brock Street*, subject to the covenants and provisoes I have stated, provided these covenants are now in force.

By

By indentures of 15th and 16th *May* in the same year (1767), a similar conveyance was made by Mr. *Wood* and Sir *Benet Garrard* to a person of the name of *Freeman*, of the messuage and land on which the house of the Defendant stands, now known as No. 9, *Brock Street*. The Defendant claims through *Freeman* and holds the house No. 9, *Brock Street*, subject to the same provisos and covenants as are contained in the indentures of 22nd and 23rd *May*, 1767, provided that these covenants are now in force.

1866.  
  
 WESTERN  
 &  
 MACDERMOT.

The first question raised by the Defendant is, assuming the covenant to be now in force and assuming also that the Plaintiff is entitled to the benefit of it, whether what the Defendant has done is any breach of the covenant, and accordingly he adduces some evidence to shew that the projection in question is not built on the garden in the rear of the house, but upon an area, which, from the earliest time that we have any trace of the construction of this house, existed between the house as originally built and the garden in the rear of it. I am of opinion this contention fails. I think that the plain meaning of the covenant contained in the deed is, that no building shall be raised on the land lying to the south side or to the rear thereof of the houses, above the level of the parlour floor, whether this space was used as a garden or whether it was all paved and called an area or a court yard or by any other designation. The depth of the houses seems to have been fixed at forty feet, and they are all made uniform in this respect, and the covenant applies to all alike.

The next most important matter urged in defence is, that this is no personal covenant entered into by the Defendant, and that if it be a covenant running with the land, then that the Defendant has, for the building he  
 has

1866.  
WESTERN  
v.  
MACDERMOT.

has half made, the consent of the covenantee Mr. *Tite*, who is the person in whom the perpetual rent charge issuing out of the house No. 9 is now vested.

It was principally for the purpose of considering this question, that I reserved my judgment in this case; but I am of opinion that this defence also fails. I think it unnecessary to determine whether this is, technically speaking, a covenant that runs with the land, but I am of opinion that it is a subsisting covenant and that the Plaintiff has a right to the benefit of this covenant, and that the owner of the rent charge for the time being issuing out of the land has no power to release or to discharge it. The owner of every adjoining tenement is also bound by the same covenant, and is subject to the obligation to perform it. The covenant by which the Defendant is bound is a covenant entered into by *Freeman*, under whom the Defendant claims the messuage he holds, by which *Freeman* bound himself, his heirs and assigns, by covenant entered into with Sir *Benet Garrard* and *John Wood* and each of their heirs and assigns, that no building whatever in the garden attached to the house No. 9 should exceed the level of the parlour floor. The Defendant is the assignee of *Freeman*, and the Plaintiff is the assignee of Sir *Benet Garrard* and of *John Wood*.

I am of opinion, that neither Sir *Benet Garrard* nor *John Wood*, after assigning the messuage No. 10 to the Plaintiff, or to those who have since assigned to the Plaintiff subject to these covenants, or who have transferred the benefit of them to the Plaintiff, could, as against the adjoining owners, release the covenant or discharge the Defendant from his liability to perform it. Some technical arguments may be, and have been, raised upon the form in which the covenant is entered into with the covenantees; but, in my opinion, they do  
not

not affect the substance of the question. I consider it clear, that if immediately after the conveyance of the 15th and 16th of *May*, 1716, to *Freeman*, Mr. *Wood* had attempted, with or without the consent of Sir *Benet Garrard*, to build over the whole of the garden of the messuage No. 10, Mr. *Freeman* could have prevented that act, and next that this Court would have granted an injunction for that purpose. I am also of opinion, that the same right belonged to Mr. *Rodham*, *e converso*, after the indenture of the 22nd and 23rd of *May*, 1767, and that this reciprocal right and obligation is handed down from successor to successor indefinitely, so that every one that receives a substantial injury by the breach thereof is entitled to the assistance of this Court for redress.

1866.  
  
 WESTERN  
 v.  
 MACDERMOT.

I use the words "substantial injury," because it is, I think, clear that a mere nominal breach of the covenant, which inflicted no injury at all, would not justify this Court in interfering, which would, in that case, leave the parties to their remedy at law to obtain such compensation as they might be entitled to. But I have already observed, that the conclusion which I have arrived at upon the evidence is, that the circular projection of No. 9, to the extent of eight feet in the centre, is a substantial injury to the owner of the house No. 10, affecting to an appreciable extent his comfort, and also the value of his property.

This immediately introduces the consideration of another ground of defence, which is prominently brought forward by the Defendant in answer to the Plaintiff's case, which is, that this covenant has, by common consent, been wholly disregarded by the parties entitled to the benefit of it, including the Plaintiff himself. This defence consists principally in  
 the

1866.

  
WESTERN  
v.  
MACDERMOT.

the fact, that trees from eight to forty feet in height have, for many years, been growing and are now standing on the lands formerly called *King's Mead Furlong*, and that, along the southern and western boundary of *King's Mead Furlong*, cottages have been built and are now standing, and that this has been acquiesced in by the Plaintiff, and by his predecessors. That besides this, trees and shrubs from eight to forty feet have been growing and are now standing in the garden of other houses, forming the south side of *Brock Street*, and that, in particular, the Plaintiff himself had a fig tree, a thorn and a mulberry tree in his garden which towered above the level prescribed by the covenant, and that though the fig tree and the thorn have been lopped down to the prescribed level, since the institution of this suit, the mulberry tree still continues to lift its head above the level to which it is limited by the covenant. In my opinion, this defence is also ineffectual. I am by no means satisfied that these trees are an injury at all to any of the houses in *Brock Street*, or that this Court would have granted an injunction to compel their being lopped to the prescribed limit; but, assuming such to be the fact, I am of opinion, that the Plaintiff, because he has not complained of a breach of the covenant which, in his opinion, inflicted no injury upon him, has not thereby debarred himself from complaining of a breach which does affect the value of his property. If this were the law, then, because the owner of the house No. 10 enjoyed the sight of trees and shrubs in *King's Mead Furlong*, and encouraged their being planted, he would have rendered himself liable to have a row of houses built at the bottom of each of the gardens to the south of *Brock Street*, wholly shutting out a striking prospect from the back rooms of his house, and diminishing, to some extent, the free transmission of light and circulation

culatation of air. I am of opinion, that the Plaintiff has not, by these means, lost the right to stop such an injury to his property; but if the contention of the Defendant be correct, it would necessarily follow, that the garden to the south of these houses might be built over by placing thereon an opposite row of houses so as to exclude the views and prospects which might have mainly induced the Plaintiff to buy his house, and this might be done to any extent that would not amount to what the law would consider an interference with the ancient lights of the Plaintiff, while, unquestionably, a very serious diminution of value may be inflicted on a man's property, which could not be considered as any legal interference with his ancient lights.

It was suggested, that this suit ought to have been on behalf of all the other owners of houses in *Brock Street*. But I am of opinion that one alone, who is injured, is entitled to ask for redress, although the others should decline doing so, or disregard the act complained of. It may also well be, that the injury is principally, if not entirely, felt by one or two of the owners, and that those who are further off sustain no inconvenience, in which case they could not be required to concur in or support the application. In my opinion the questions at issue in this case resolve themselves simply into these two:—first, is the covenant entered into by those under whom the Defendant takes his property now in force, and is one by which he is bound? secondly, if this question is answered in the affirmative, has there been a substantial breach of it, in other words, is the Plaintiff's property substantially injured by the erection constructed by the Defendant? I am of opinion that both these questions must be answered in the affirmative, and that the Plaintiff is entitled to a decree, and that, in pursuance with the undertaking entered into with the Plaintiff

1866.

WESTERN  
v.  
MACDERMOT.

## CASES IN CHANCERY.

1866.

WESTERN  
v.  
MACDERMOT.

Plaintiff and the Court at the hearing of the motion for an injunction, the Defendant must remove the pro-  
jection he has erected.

The costs must follow the event.

NOTE.—Affirmed by Lord Chelmsford, L. C., December 4, 1866.

Jan. 22.

Where the title to a lost policy is clear, the insurance company is entitled to no indemnity where they pay the money into Court.

## ENGLAND v. LORD TREDEGAR.

A POLICY in the *Equitable Assurance Company* effected in 1803 on the life of *Francis Dancer* had been made the subject of a settlement; but the policy had been lost many years ago. This was a suit by the trustees of the settlement against the officers of the assurance company to obtain payment.

*Francis Dancer* died in 1864.

The Plaintiffs were the present trustees, and their title was not disputed; but the company, according to their practice, required a bond of indemnity from the Plaintiffs with two sureties. The Plaintiffs, being mere trustees, were unable to comply with the demand.

Mr. *Selwyn* and Mr. *Druce*, for the Plaintiffs, asked that the amount which had been paid into Court in the cause might be transferred to a suit of *England Lewis*, instituted to administer the trusts of the settlement. They said it had been held by Vice-Chancellor *Stuart* in *Crookatt v. Ford* (a), under similar circumstances, that an insurance company were not entitled to any indemnity, and that that case had been followed by Vice-Chancellor *Wood* in *Field v. Barnwell*.

Mr. *Southgate* and Mr. *Dickinson*, for the

(b) Unreported.

ants, insisted on the company's right to be indemnified, and they cited *Bushman v. Morgan* (a).

1866.

ENGLAND  
v.  
LORD  
TREDEGAR.

*The MASTER of the ROLLS.*

The payment into Court in the administration suit will be a sufficient indemnity to the Defendants, and so it has been held in the cases cited.

(a) 5 Sim. 635.

DICKINSON v. BURRELL.

**T**HIS was a demurrer, on the ground that the Plaintiffs had no right to institute this suit. The case made by the bill was shortly this:—*James Dickinson* was entitled to an undivided share (five-eighths) in the estate of *John Whitehead*, deceased (a). In *December, 1860*, he sold and conveyed one-half of his share (five-sixteenths) to the Defendant *John Edens*, in consideration of 100*l.*

Jan. 22, 25.

Distinction between selling a mere right to set aside a fraudulent conveyance, and selling the property itself after such a conveyance. In the first case, the purchaser cannot sue to set aside the conveyance, but in the latter he can.

**A**fterwards, by a decree, pronounced on the 22nd of *March, 1862*, which declared the rights of the parties to the fund in Court, five-sixteenths were declared to belong to *Edens*.

In 1860, *A. B.* sold and conveyed some property to *C. D.* Afterwards, in 1864, *A. B.*, by a deed reciting that the deed

(a) Some of the facts relating to the title will be found stated in *Ibbott v. Bell*, 34 Beav. 396, and

*Dickinson v. Stidolph*, 11 C. B. Rep. (N. S.) 341.

of 1860 was invalid, voluntarily conveyed the same property to trustees for himself for life, with remainder to his children:—*Held*, that the infant children of *A. B.* could maintain a suit, as sole Plaintiffs, to set aside the deed of 1860; the right to sue being incidental to the property conveyed.

The construction of and the rights and incidents under a voluntary deed, if *bonâ fide* and valid, are the same as of a deed for value.



1866.  
 DICKINSON  
 v.  
 BURRELL.

# CASES IN CHANCERY.

In April, 1864, *James Dickinson*, by a voluntary deed executed by him, reciting the conveyance to *Edens* and disputing its validity, conveyed his share, so sold to *Edens*, to two trustees, *Slatford* and *Fischer*, in trust to sell and stand possessed of the produce upon trust—first, to pay the costs; secondly, to pay 200*l.* to *James Dickinson*; and, thirdly, to invest the residue and pay the interest of it to *James Dickinson* for life, and after his death, to divide it amongst his children as he should appoint, and in default, equally.

*James Dickinson* had eight children, and five of them, who were infants, filed this bill against *Burrell* (who had been their father's solicitor), *Edens* (the purchaser), their father *James Dickinson*, his three adult children, and the trustees of the voluntary settlement of 1864. In it they alleged, that the sale and conveyance of December, 1860, to *Edens* was obtained by fraud; that, in truth, it was a purchase by Mr. *Burrell*, who then acted as the solicitor of *James Dickinson*, for himself, of *James Dickinson's* share; that the purchase was made in the name of *Edens* merely as a cover to conceal the real transaction, and that *Burrell*, by these means and taking advantage of the ignorance and necessities of his client, obtained from him, at a grossly inadequate value, his share in *Whitehead's* estate. Such was the substance of the allegation of fraud.

The bill, amongst other things, sought to set aside the conveyance to *Edens* and the order declaring his rights, and it prayed for a declaration of the rights of the parties under the voluntary conveyance.

In this bill *Edens* demurred for want of equity.

Mr. *Selwyn*, Mr. *Jessel* and Mr. *Hemings* in sup

of the demurrer. The Plaintiffs have no right to sue; they claim under a settlement which could only convey a bare right to take legal proceedings to set aside a prior deed on the ground of fraud, and to which they were no parties, and by which they were not affected. This is contrary to public policy, and is open to the objection of champerty and maintenance; *Prosser v. Edmonds* (a); *Cockell v. Taylor* (b); *Anderson v. Radcliffe* (c). This objection would apply, even if the Plaintiffs had been purchasers for valuable consideration; but here it applies more forcibly, for they are mere volunteers, whose interests are contingent; *Davis v. Lord Dysart* (d); *Pennell v. Lord Dysart* (e); and may be destroyed by a sale to a purchaser for valuable consideration under the 27 *Eliz.* c. 4.

It is obvious that this settlement was executed for the express purpose of enabling these infants to sue:—to release adults from all liability to costs in case of failure, and to place the Defendants in a difficulty in defending themselves. They also referred to *Doe d. Newman v. Rusham* (f); *Lewis v. Rees* (g).

Mr. Southgate and Mr. F. Webb in support of the Bill. The doctrine of champerty and maintenance is not to be extended, and it has no application to this case. The conveyance is of the property itself, to which the right to sue is incident. The existence of a dispute or fraud does not prevent a man selling or settling his property, and even the mere assignment to a purchaser of the subject of a suit is not maintenance, unless the purchaser indemnifies the vendor against the costs incurred by him in the prosecution of the suit; *Harrington v. Long*;

(a) 1 *Y. & Col. (Exch.)* 481.

(b) 15 *Beav.* 103.

(c) *Ell., B. & E.* 806, 819.

(d) 20 *Beav.* 405.

(e) 27 *Beav.* 542.

(f) 17 *Q. B. Rep.* 723.

(g) 3 *K. & J.* 132.

1866.

DICKINSON  
v.  
BURRELL.

1866.  
  
 DICKINSON  
 v.  
 BURRELL.

v. *Long* (a); *Hartley v. Russell* (b); *Knight v. Bowyer* (c);  
*Gresley v. Mousley* (d). In regard to this objection,  
 there can be no difference between a voluntary deed  
 and one for valuable consideration. They also referred  
 to *Uppington v. Bullen* (e); *Stump v. Gaby* (f).

Mr. Selwyn in reply.

Jan. 25.      *The MASTER of the ROLLS* [after stating the circum-  
 stances]—

*James Dickinson* does not join as co-Plaintiff, neither  
 do his three adult children, whose interests are the same  
 as the Plaintiffs.' They are necessary parties to the suit,  
 and it is suggested that they are not parties; but it  
 appears that four persons of the name of *Dickinson* are  
 Defendants, and though the allegation is not precise  
 that these are the persons in question, I think that it is  
 a fair presumption, from the whole of the allegation,  
 taken together, that the first *James Dickinson* is the  
 father, the *James Dickinson* the younger, *Charlotte*  
 and *Henry Dickinson* are the three other children,  
 besides the Plaintiffs, of *James Dickinson* the father.  
 This would not materially affect the question I have to  
 decide, as, if the Defendants' contention were valid, I  
 should give leave to amend or reserve the objection to  
 the hearing, where it might prevail, if it were then shewn  
 that the father and his remaining children were not  
 parties to the suit.

Upon the allegation contained in the bill, the substance

c

(a) 2 *Myl. & K.* 590.

(b) 2 *Sim & Stu.* 244.

(c) 23 *Beav.* 609, and 2 *De G.*  
 491.

(d) 4 *De G. & J.* 78.

(e) 2 *Dru. & War.* 184.

(f) 2 *De G., M. & G.* 62

of which I have just stated, I am of opinion that a case is alleged on which this Court would give relief at the instance of the proper persons.

1866.

DICKINSON  
v.  
BURRELL.

The only question that I have to determine on this demurrer, therefore, is, whether, by reason of the deed of *April*, 1864, the Plaintiffs have a right to ask for that relief which their father, the settlor, and the trustees of the settlement, have refused or declined to concur in asking?

The demurrer is mainly supported on the case of *Prosser v. Edmonds* (a), decided after long deliberation by Lord Abinger, but I am of opinion that the case before me does not fall within the rule established by that decision. In the first place, I will consider this case as if the indenture of *April*, 1864, had been executed for a valuable consideration; and then I will consider the difference arising from the circumstance that the deed was voluntary. Assuming the deed of *April*, 1864, to have been executed for value, then the right of suing is incidental to the conveyance of the property and passes with it. If *James Dickinson* had thought fit, after the sale to *Edens* in *December*, 1860, to sell the property to *A. B.*, saying that the sale to *Edens* was fraudulent; that he would not take any step to set it aside, but that, if *A. B.* thought fit so to do, he would sell all his interest in the property to him for a sum of money, which they *bonâ fide* agreed upon; in such a case, in my opinion, *A. B.* could have maintained this suit.

The distinction is this:—If *James Dickinson* had sold or conveyed the right to sue to set aside the indenture of *December*, 1860, without selling the property, or rather his

(a) 1 Y. & Coll. (Exch.) 481.

1866.

DICKINSON  
v.  
BURRELL.

his interest in the property, which is the subject of the indenture of *December*, 1860, that would not have enabled *A. B.* to maintain this bill; but if *A. B.* had bought the absolute interest of *James Dickinson* in the property then it would. It is a right incidental to the property conveyed, nor is it, in my opinion, a right which is only incidental to the property when conveyed as a whole, but it is incidental to each interest carved out of it: *e.g.*, if the property had been conveyed by *James Dickinson* to three persons as tenants in common, each one might have instituted the suit, making the other tenants in common parties if they refused to concur; but provided the case were brought before the Court so that the whole matter might be determined in one suit, so as to bind all parties to the transaction, and so that the Defendant *Edens* would have had only to contest the question once, then, in my opinion, the suit might be brought by a person having only a share in the property conveyed. Neither could it, in my opinion, be material whether the share was an absolute undivided share in fee simple, or whether it was merely a life interest or an interest in reversion. In truth, in all the cases in which, if there had been no previous circumstances to raise a contest as to the invalidity of any previous deed, the interest which would have been sufficient to enable a person interested in the fund to be produced by the sale of the estate to ask this Court to secure it for the benefit of the persons interested therein, would, in my opinion, enable that person to ask this Court to set aside a deed obtained by fraud, which, if valid, would have prejudiced or destroyed his interest in the property purported to be conveyed to him.

I think that this distinction between conveying the property itself and of a mere right to sue is taken by Lord *Abinger* in *Prosser v. Edmonds* (a). It is taken in

(a) 1 Y. & Coll. (Exch.) 481.

in *Cockell v. Taylor* (a), and it is taken in *Anderson v. Radcliffe* (b), and has been adopted and approved in many other cases; and it is, I think, founded on reason and good sense.

1866.  
  
 DICKINSON  
 v.  
 BURRELL.

I am therefore of opinion, that if the present Plaintiffs had given a valuable consideration for the execution of the indenture of *April*, 1864, they would have been entitled to maintain this suit.

I have next to consider, whether the fact of the conveyance being voluntary alters or affects their right, and I am of opinion that it does not.

There are, no doubt, various circumstances which may be connected with a voluntary deed, which, when they are so connected, will induce this Court either to set the deed aside, or to refuse to execute the trusts contained in it. There are also statutory enactments which may defeat such a deed, which would be otherwise valid; but, assuming the voluntary deed to be complete, *bonâ fide* and valid, and to be unaffected by any statutory disability, I know of no distinction between such a deed and one executed for valuable consideration. The estates and limitations created in such a deed have the same operation and effect as if executed for value, and it must be construed in the same manner; and it carries with it all the same incidents and rights attached to property conveyed as are carried by a deed for value; and the grantee in this respect stands exactly in the same situation as if he had paid value for the property conveyed.

In a case of the description before me, the fact that  
 the

(a) 15 *Beav.* 103.

(b) *Ell. B. & El.* 806, 819.

1866.  
 ~~~~~  
 DICKINSON
 v.
 BURRELL.

the conveyance is voluntary, suggests the possibility of some secret understanding, or some subordinate agreement, by which the property, when recovered, is to be reconveyed or discharged of the trusts, and that, in fact, the voluntary conveyance is made solely for the purpose of instituting and maintaining such a suit as the present. This may possibly be shewn hereafter in the progress of the suit; but on this demurrer, I cannot entertain any such suspicion. I am bound by the allegations in the bill, which I must assume to be true, and, so regarding it, the right to sue is, in my opinion, incidental to the interest conveyed to the Plaintiff, and the demurrer must be overruled.

NOTE.—See *Chitty's Statutes*, 483 (3rd edit.) tit. "Champerty."

1865.
 Nov. 21.
 A patentee is not entitled, after replication, to an order, under 15 & 16 Vict. c. 83, s. 41, for the delivery of particulars of the objections to the patent which the Defendant intends to rely on.

BOVILL v. GOODIER.

THIS was a patent suit, in which the Defendant, by his answer, disputed, in general terms, the validity of the Plaintiff's patent, on the usual grounds, viz., want of novelty, non-infringement, that the invention was not the subject of a patent, and the insufficiency of the specification. The Plaintiff had applied for an issue, but his application had been refused with costs, and on the 24th of June, 1865, he filed a replication. The Plaintiff applied by summons in Chambers for an order on the Defendant to furnish the particulars of the objections to the patent which he intended to rely on.

At common law such particulars are required to be delivered with the pleas (15 & 16 Vict. c. 83, s. 41), and orders for such particulars have also been made in equity, in cases where issues of fact have been ordered

to be tried under Sir *Hugh Cairn's* Act (25 & 26 *Vict.* c. 42); but there appeared to be no authority for such an order under the circumstances of the present suit. In the absence of such authority, the Chief Clerk declined to make the order, and the point was, at the request of the parties, adjourned into Court.

1865.

BOVILL
v.
GOODIER.

Mr. *Buggallay* and Mr. *Druce* for the Plaintiff.
“The Patent Law Amendment Act, 1852 (15 & 16 *Vict.* c. 85, s. 41), requires a Defendant to deliver, with his pleas, particulars of any objection on which he means to rely at the trial,” and the places at which the prior user is alleged to have taken place. The object of this was, to prevent a patentee being taken by surprise.

[*The MASTER of the ROLLS.* That section only applies to actions at law; but, in equity, you may obtain all the information you require by the answer.]

The Defendant would object that it would be evidence of the Defendant's and not of the Plaintiff's title.

The Court, under Mr. *Rolt's* Act (25 & 26 *Vict.* c. 42), is now bound to determine questions of law; it ought, therefore, to adopt the same course of proceeding as at law. It will be impossible for the Plaintiff to prepare and meet every case of alleged user, without having them specified beforehand. The Defendant may bring forward any number of instances of alleged prior user, in remote parts of the country, which it will be impossible for the Plaintiff to meet. If the Court should direct an issue, the particulars must necessarily be then specified, and, whether tried here or at law, it will save considerable expense to limit the evidence to the particular instances specified. It is but just that the

1865. the Plaintiff should know on what case the Defendant
 Bovill relies, in order that he may be prepared to contest it by
 v. evidence.
 Goodier.

Mr. Selwyn and Mr. Little were not called on.

The MASTER of the ROLLS.

If I had had any doubt upon the matter, the last argument would have convinced me that it was unfit for me to grant this application. The argument is this:—that, according to the course and the principles upon which discovery is granted in a Court of Equity, this particular information could not be now obtained, and therefore, by reason of its being given in actions of law, the Plaintiff is entitled to ask for that which, according to the ordinary principles of discovery in equity, he is not entitled to obtain. The additional reason is still more singular: it is, that, because if this be not done, the Plaintiff will be compelled to go to the expense of getting up all his evidence and shewing to the Defendant exactly what it is that he relies on. That is the very thing which the Plaintiff is calling upon the Defendant to do, and it is clear, that if in equity the Defendant is required to do it, the Plaintiff would be required to do it also.

It is true, that an issue is not, in all cases, a matter *ex debito justitiæ*, to which the party has a positive right. When a cause comes on for hearing, the Court, having before it the evidence on both sides, determines what particular issue, if any, shall be tried. The Plaintiff might undoubtedly have done this:—he might have given notice of motion for a decree, and then he would have known, from the affidavits of the Defendant, the exact case which he (the Plaintiff) had to meet, and
 what

what the Defendant intended to rely upon, and if the Defendant in his affidavit in answer was unable to rebut the instances alleged of prior user, then the Plaintiff would have rested his case on that simply, and he would have known the whole of the Defendant's case. But it being at the Plaintiff's option either to give notice of motion for a decree or to file a replication, he has thought fit to do the latter, and to leave the whole matter in obscurity until the publication of the evidence. He then endeavours to engraft on the chancery proceedings, that which the statute has confined to common law, and which it does not extend to cases in equity; and he thereby endeavours to obtain, according to his counsel's own statement, a discovery to which, by the ordinary principles and doctrines of a Court of Equity, he is not entitled. I express no opinion as to whether he is or is not so entitled, but that is the argument before me. When the case comes on to be heard after the publication of the evidence, then a different state of things arises. Then, when I have directed issues at law, I have followed the practice of common law, and have directed the particulars of the objections to the patent to be given. I remember a patent case respecting a silk throwing machine, in which I directed an issue to be tried before myself, and I there ordered that the particulars of objections should be delivered beforehand, and, at the hearing, I confined the Defendant to those particulars. But here I should be acting unfairly, if I were to compel it to be done in this stage of the cause. This application must be refused with costs; but I do not thereby intimate that, if I direct an issue, the Plaintiff will not be entitled to what he now asks.

1865.

BOVILL
v.
GOODIER.

1866.

THE ATTORNEY-GENERAL, on behalf of Her Majesty, v. THE SITTINGBOURNE, &c. RAILWAY COMPANY.

Feb. 10, 12.

In a suit by an unpaid vendor, the Court decreed a specific performance, and the payment of the purchase-money and damages. The purchasers were unable to pay, and the property was in the possession of a Receiver in another suit instituted by persons claiming charges under the purchasers. A petition by the vendor, served upon the purchaser and the Plaintiffs in the other suit to enforce his lien and obtain a sale of the property, was dismissed with costs, the proper remedy being by bill.

BY an indenture, dated in 1858, and made between the Queen (1), the Commissioners of Woods and Forests (2), the lessee (3), and this company (4), the company agreed to pay to the Queen 2,000*l.* for the Crown's interest in a piece of land taken for the railway. The company entered into possession and constructed their railway on part of this land.

This information was filed to compel the specific performance of the contract, and, by the decree made in January, 1864, the Court directed a specific performance, and declared that the company ought to pay the 2,000*l.* and interest. The Court also directed certain inquiries as to damages, and ordered the company, within six months from the date of the Chief Clerk's certificate, to pay to the commissioners what should be certified to be due.

The Chief Clerk, in November, 1864, certified that 3,482*l.* was due. The six months had expired and no payment had been made. The company admitted that they were not in a position to pay, as all the property of the company was in the hands of a receiver appointed in November, 1863, in another suit of *Skinner v. The Sittingbourne, &c., Railway Company*, which had been instituted by mortgage creditors on behalf of themselves and all other like creditors. In June, 1864, a decree had been made, in that suit, declaring the rights of the mortgage

mortgage creditors to a charge, and, after directing accounts and inquiries, it continued the Receiver. This decree had been made without prejudice to the rights, if any, of prior incumbrancers.

1866.

ATT.-GEN.
on behalf of
HER MAJESTY

v.
THE SITTING-
BOURNE, &C.
RAIL. Co.

The Attorney-General presented this petition in his own suit alone, alleging that it was not practicable, by sequestration, to compel the company to obey the decree in this cause, and, on behalf of her Majesty, he submitted that he was entitled to a lien on the piece of land, and that it ought to be sold in satisfaction of the decree.

The petition prayed that the company might be ordered to pay the aggregate of the monies due within two months, and that, in default, the land might be sold, and the produce applied in payment of the amount due to the Crown.

The petition was served on the company, the Plaintiffs in the other suit, and the *London, Chatham and Dover Railway Company*, who were in possession of the line under an agreement dated in 1863.

Mr. *W. M. James* and Mr. *Pemberton*, in support of the petition, argued, that the Crown had a lien for the purchase-money, and that, if the company would not pay, a sale ought to be directed.

They cited *Walker v. The Ware, &c., Railway Company* (a); and see *Foligno v. Martin* (b); *Simpson v. Terry* (c); *Sweet v. Meredith* (d).

Mr. *F. H. Colt*, for the Plaintiffs in the suit of *Skinner*

(a) 35 *Beav.* 52.
(b) 16 *Beav.* 586.

(c) 34 *Beav.* 423.
(d) 4 *Giff.* 207.

1866. *Skinner v. The Sittingbourne, &c., Railway Company.*
 The decree in this suit contains no declaration of the
 lien of the Crown, and that cannot be obtained upon
 petition. The other incumbancers on this property
 have a right to be heard in a suit properly constituted,
 and to insist that the Crown has no lien at all, or that
 it has no priority, or that the amount claimed is not
 due. This cannot be done upon a petition in a suit to
 which they are not parties.

ATT. GEN.
 on behalf of
 HER MAJESTY
 v.
 THE SITTING-
 BOURNE, &c.
 RAIL. CO.

Mr. *Bevir* for the *Sittingbourne, &c., Railway Company.*

Mr. *Baggallay* and Mr. *Kekewich* for the *London, Chatham and Dover Railway Company.* No order can be made on this petition. The order, if made, must necessarily affect the rights of the Respondents and will be binding on them if made in their presence. *The London, Chatham and Dover Railway Company* will, at the proper time, contend that the Crown has no priority over them; but they decline to go into the merits or dispute the priorities except in a suit properly constituted.

Mr. *W. M. James* in reply. I do not ask any declaration of the Crown's lien, that is not necessary, neither do I ask to affect the rights of the incumbancers, who can take nothing on this piece of land except through the Defendant Company, that is the purchasers who have not paid the purchase-money; but I ask a sale.


The MASTER of the ROLLS.

Feb. 12. I think that this petition is misconceived. It is, in fact, presented for the purpose of enforcing a lien which
 has

has not hitherto been declared by the decree of the Court. It is true that a purchaser has a lien for his unpaid purchase-money, but he cannot, if he requires the aid of this Court, act differently from any other mortgagee or other person claiming a lien. He must institute a suit and get that lien declared against all the persons interested in the estate; or, at least, all those who are subsequent in date to him and who are to be foreclosed by him. But, if I made the order permitting or directing a sale of this property, I should not only be giving the Petitioner, on behalf of the Crown, the benefit of a lien which has not been established in any proceeding in this Court, but I should be doing so against Respondents who have not, hitherto, had any opportunity of contesting the case of the Petitioner or the amount of the debt he insists on being due. In this case, the decree simply directs specific performance and payment, three months after the certificate of the chief clerk, of various sums to be ascertained; but not only has the Court not declared that this amount is a charge on the property sold, but a portion of that amount, for instance, that which consists of compensation for damage due from the railway company, for the non-execution of certain works, would appear to me not to be a charge on any of the property sold. I mention this only for the purpose of showing the difficulty I should have, if I were to enter into this question now, without proper materials, and with Respondents not properly instructed to meet the case. If the Petitioner, on behalf of the Crown, claimed a lien on this piece of land so sold, it would be necessary, before I could direct a sale of it, to have a decree ascertaining the amount of that lien, made in the presence of those persons who claimed subsequent charges on the property and the property itself. Now, assuming that the decree obtained has established that the Petitioner, in right of

1866.

ATT.-GEN.
on behalf of
HER MAJESTY
v.
THE SITTING-
BOURNE, & C.
RAIL. CO.

1866.

 ATT.-GEN.
 on behalf of
 HER MAJESTY
 v.
 THE SITTING-
 BOURNE, & C.
 RAIL. CO.

of the Crown, is entitled to a charge on this property, the amount has been ascertained when the Plaintiffs, for whom Mr. *Colt* appears, were not present, and when the *London, Chatham and Dover Railway Company* were not present, both being parties materially interested in disputing the amount claimed.

If I directed a sale, I should, in fact, without suit or decree for that purpose, give priority to that charge over the two others and foreclose them, by paying the purchase-money to the Petitioner, on behalf of the Crown, without their having had any opportunity of being heard or of contesting the right of Petitioner.

Whatever remedies are open to Petitioner to enforce his decree by sequestration, he may adopt them, but he does not want the assistance of the Court for that purpose. If he goes beyond that, he must file a bill in the usual way against the proper Defendants to enforce his lien and get the benefit of it. I must dismiss the Petition with the usual costs as against the Crown.

Mr. *W. M. James*. There is a settled form in such cases (a).

(a) *Attorney General v. Hammer*, 4 *De G. & Jones*, 205, and 18 & 19 *Vict. c. 90*.

1866.

**Re THE HOP AND MALT EXCHANGE AND
WAREHOUSE COMPANY (LIMITED).**

BRIGGS' Case.

Feb. 8, 13.

THIS was an application by Mr. *Briggs*, under "The Companies Act, 1862" (25 & 26 Vict. c. 89, s. 35), to remove his name from the list of shareholders, on the ground of a misrepresentation in the prospectus of the company, upon the faith of which prospectus Mr. *Briggs* had taken some shares in the company.

Though the articles of association of a company materially extend the objects of the company beyond those stated in the prospectus, still, if the prospectus refers to the articles, a person taking shares upon the faith of the prospectus is bound by the articles, unless they are wholly incompatible with the prospectus.

The prospectus stated the object of the company to be, to provide a hop and malt exchange and a warehouse for stowage, and other purposes; but nothing was said as to making loans of money. It however stated, that the company had been registered, and that the memorandum of association might be seen either at the offices of the company or at the solicitor's.

A shareholder, who had taken shares on the faith of a prospectus, afterwards discovered that by the articles of association the objects of the company materially differed from those stated in the prospectus. He subsequently dealt with the shares as owner, by

After taking the shares, Mr. *Briggs* discovered that, in the memorandum of association, and in addition to the objects stated in the prospectus, this further object was stated: "for advancing money to growers, merchants or factors, upon the security of their crops and produce, whether growing or stored in the company's warehouses, or in bond, or upon the security of dock or other warrants, or property of a like description, and otherwise for the accommodation of hop and other merchants, maltsters, factors, brewers and others connected with the hop and malt trades.

He

attempting to sell them:—*Held*, that he had acquiesced and could repudiate them on the ground of the misrepresentation.

1866.

Re
THE HOP
AND MALT
EXCHANGE
AND WARE-
HOUSE CO.
LIMITED.

BRIGGS' CASE.

He also discovered that the 69th article of the association authorized the directors to make advances of money upon hops, &c., to growers, &c., "and to such other persons as they should think fit, and upon such security, negotiable or otherwise, as they should deem expedient."

After making this discovery, Mr. *Briggs* instructed his brokers to sell his shares for the account, and the broker sold them accordingly at fifty shillings a share premium. But the committee of the stock exchange having refused to fix a settling day for the account of shares in this company, the effect was to annul the conditional sale. Mr. *Briggs* thereupon repudiated his shares, required them to be cancelled, and now applied to rectify the register of members by omitting his name.

Mr. *Southgate* and Mr. *Brooksbank* in support of the motion. The company is bound by the statements contained in the prospectus. Mr. *Briggs* took these shares on the faith of that prospectus and in the belief that the company was formed solely for the objects therein stated. But the objects of the company, as shewn by the memorandum and articles, are quite different from those set forth in the prospectus. According to the prospectus, the objects are to make a hop and malt exchange and a warehouse, but one of the real objects appears to have been to become a discount company. This is a material misrepresentation, which entitles the Applicant to be discharged from his contract to take the shares; *Bell's Case* (a); *Ship's Case* (b); *Kisch. v The Venezuela Railway Company* (c); *Hutton v. The*

(a) 22 Beav. 35.
(b) 13 W. R. 631.

(c) 34 L. J. (Ch.) 545.

The Scarborough Hotel Company (a); Rawlins v. Wickham (b); Holt's Case (c).

1866.

Re
THE HOP
AND MALT
EXCHANGE
AND WARE-
HOUSE CO.
LIMITED.

BRIGGS' CASE.

Mr. Selwyn and Mr. Roxburgh for the company. Mr. Briggs had, from the first, notice of the contents of the memorandum and articles of association; they are distinctly referred to in the prospectus, in which it is stated at what places they may be seen. A prospectus does not purport to contain all that is in the articles and memorandum of association—it gives a mere outline of them—and it would be a dangerous doctrine to hold that a person who takes shares is discharged, if there should be an accidental omission from the prospectus of something contained in the memorandum or articles. Here the additional objects are only in extension of those in the prospectus, for it is the custom of the trade to lend money on the security of hops and of produce deposited in a warehouse.

Secondly. Mr. Briggs had notice of the articles before he directed the sale of these shares; he therefore adopted them as his own after full notice, and is now bound by his acquiescence. It was some time between the 28th of July and the 24th of August that the stock exchange refused to appoint a settling day, and it was not until the 29th of August that Mr. Briggs repudiated the shares. He was bound to repudiate them immediately on his alleged discovery, and was not entitled to take the chance of obtaining 2l. 15s. premium per share and repudiate them if he failed in getting it. They cited *Bell's Case (d)*; *Holt's Case (c)*; *Ayre's Case (e)*; *Parbury's Case (f)*.

Mr. Southgate in reply. *Lindley on Partnership (g).*

The

- (a) 34 L. J. (Ch.) 643.
(b) 3 De G. & J. 304.
(c) 22 Beav. 48.
(d) Ib. 35.

- (e) 25 Beav. 513.
(f) 3 De G. & Sm. 43.
(g) Page 1170.

CASES IN CHANCERY.

The MASTER of the ROLLS.

This is an application under the 35th section of "The Companies Act, 1862," to correct the register of shareholders by omitting the name of Mr. *Briggs*, on the ground that he was induced to become a shareholder by false representations contained in the prospectus issued. The memorandum of association contains this clause—[see *ante*, p. 373]—and the articles of association contain this clause—[see *ante*, p. 374]. Most certainly, under these clauses, the society might become a mere bill discounting society, and it is also, in my opinion, equally certain, that there is nothing in the prospectus to lead to any such expectation. The prospectus, however, contained these words—[see *ante*, p. 373.]

The strong inclination of my opinion is, that after this intimation, any person applying for shares must be held to have notice of the contents of the articles of association. He is informed of their existence, and where they are; he is, in fact, thereby invited to examine them, in order thereby to test the truth of the prospectus. I admit the correctness of the argument founded on these cases, which lay down that a man cannot complain that his solemn assertion has been believed and acted upon, and if the prospectus had contained a clause negating the power contained in the 69th clause of the articles, I should not have held, that any person taking shares could have been held liable for the knowledge of that, which was in reality diametrically opposed to, or contradicted by, the prospectus. But as to all those matters which are not contradictory to the prospectus, but are compatible with it, I think that the applicant for shares cannot plead ignorance of the clauses

clauses of the articles of association, which profess to execute the objects of the prospectus, even if they go beyond it, unless they are wholly incompatible with it. I cannot but admit that the articles of association go much further than the prospectus, and indeed contain powers which the prospectus could not induce any one to expect; but I am not sure, if it turned on that alone, that I could say, that they are so inconsistent with it, or at variance with it, to such an extent as to amount to fraudulent misrepresentation, and thus enable the applicant to get rid of his shares.

But I think, in the circumstances of this case and upon the evidence, it is not necessary to decide that question, for I think that it is established, by the evidence given on the cross-examination of Mr. Briggs, that after he was acquainted with the provisions of the articles of association, he continued to keep these shares and exercised acts of ownership over them wholly inconsistent with the repudiation of them. He gave instructions to his broker to sell, for the account, the shares he had taken, and a contract was actually entered into by the broker for that purpose, at a premium of 50s. per share, in accordance with such instruction, and all this was done after Mr. Briggs had obtained such knowledge of the articles of association as I have stated. In truth, I think, on the evidence, that it was the refusal of the committee of the stock exchange to fix a settling day for the account of sales of shares of the company, the effect of which was to annul the conditional contract for the sale of Mr. Briggs' shares, that opened his eyes to the injurious effect of the articles and induced him to repudiate his shares and to require that they should be cancelled. The dates, I think, shew this. As the broker, upon the instructions given to

1866.

Re
THE HOP
AND MALT
EXCHANGE
AND WARE-
HOUSE CO.
LIMITED.

BRIGGS' CASE.

1866.

Re
THE HOP
AND MALT
EXCHANGE
AND WARE-
HOUSE CO.
LIMITED.

BRIGGS' CASE.

to him, sold the shares for the account, it must have been before the decision of the committee of the stock exchange, and Mr. *Briggs* expressly states, that he had seen the articles of association before he gave instructions to the brokers to sell the shares. It is, therefore, I think, clear, that it was the determination of the committee of the stock exchange, and not the contents of the articles, that induced Mr. *Briggs* to require his shares to be taken back. I consider his acting as owner of the shares, by endeavouring to sell them after a knowledge of the articles, is an acquiescence therein, and that he cannot now complain and ask to have his name omitted.

MORGAN v. MIDDLEMISS.

Feb. 9.

A testator, by his will, bequeathed 500*l.* to his widow, and by a codicil he bequeathed her "a further sum, not exceeding 300*l.*, making altogether a legacy of 1,000*l.* given to her by my will and this codicil:"—
Held, that there was a mere miscalculation and that, under the codicil, the widow was only entitled to 300*l.*

THE testator, by his will, bequeathed to his widow *Dinah Simmons* a legacy of 500*l.*

By a codicil the testator directed as follows:—

"In case my wife shall require a larger principal sum than I have left her in my will, I direct the trustees or trustee, for the time being, to pay to her, out of unappropriated surplus money, for her absolute use, such further sum, *not exceeding 300*l.*, making altogether a legacy of 1,000*l.* given to her by my will and this codicil.*"

The question was, whether the Defendant *Dinah Simmons* was entitled, under the codicil, to a legacy of 500*l.*, or to any and what other sum, in addition to the legacy of 500*l.* bequeathed to her by the will.

Mr. *Southgate* and Mr. *Everitt*, for the Plaintiff, the assignee

signee of the residuary legatee, argued, that the
low was entitled in the whole to 800*l*.

1866.

MORGAN

v.

MIDDLEMISS.

Mr. *J. Pearson*, for the widow, insisted that she was
titled, under the codicil, to such a sum as would
make altogether a legacy of 1,000*l*."

He cited *Milner v. Milner* (a); *Jordan v. For-*
cue (b); *Ottley v. Gilby* (c).

The MASTER of the ROLLS.

I think that, under the codicil, the widow is only
titled to 300*l*. She is to have a sum not exceeding
0*l*., but the testator says, "making altogether a
legacy of 1,000*l*. given to her by my will and this
dicil." The sentence is singular, but I am of opinion,
at the codicil simply gives 300*l*., and that what
follows is a mere matter of miscalculation. I cannot
read the words as if he had said, "I intend, by giving
me a legacy not exceeding 300*l*., to make up, together
with what I have given by my will, a legacy of 1,000*l*.
cannot turn "not exceeding 300*l*." into 500*l*.

(a) 1 *Ves. sen.* 106.

(b) 10 *Beav.* 259.

(c) 8 *Beav.* 602.

1866.

Feb. 15.

During a voluntary winding-up, an action having been brought against the company on bills of exchange, the Court stayed execution only, and directed the costs to be added to the debt.

THE PENINSULAR, &c., BANKING COMPANY.

THIS company, incorporated in 1864, was being wound up voluntarily. In *January*, 1866, and after the commencement of the winding-up, an action had been brought by a creditor against the company on twelve bills of exchange, and on the 16th of *February*, the Plaintiffs would be entitled to sign judgment.

Mr. *Cottrel* now moved, under "The Companies Act, 1862" (25 & 26 *Vict.* c. 129), to stay all further proceedings in the action.

He cited *In re Keynsham Company* (a); *Re Life Association of England, Limited* (b).

Mr. *Southgate* and Mr. *Druce*, *contrà*, argued, that the power to grant injunctions did not apply to a voluntary winding-up.

The MASTER of the ROLLS.

I will stay execution only, and the creditor can go in under the winding-up. He must add his costs to his debt, I cannot make him pay costs.

(a) 33 *Beav.* 123.(b) 12 *W. Rep.* 1069.

1866.

BUCKLAND v. PAPILLON.

Jan. 17, 18.
Feb. 8.

THE case came on for argument on general demurrer to the Plaintiff's bills, which in effect stated as follows:—

On the 27th September, 1856, the Defendant agreed to grant a lease of the offices and cellars in the basement floor of No. 5, *Waterloo Place, Pall Mall*, to Mr. *Bloxam*, who afterwards became bankrupt.

A memorandum of agreement of that date was duly signed by both parties, whereby the Defendant agreed to let, and *Bloxam* agreed to take, the offices and cellars of No. 5 for three years, at a rental of 60*l. per annum*, free from all taxes, from the 29th of September then next ensuing. The memorandum contained the following clause:—"It is further agreed, that *Papillon* shall, whenever called upon so to do by *Bloxam*, grant a lease to him, at his *Bloxam's* expense, of the before-mentioned offices and cellars at the rent of 60*l. per annum*, for a period either of three years, seven years, or the remainder of the term, from this date, that the said *John Papillon* has at present in his power to grant; such lease to contain all the usual covenants for protecting the interest of the said *John Papillon*." Then followed a proviso against carrying on offensive trades, and that *Bloxam* would give six months' notice of his intention of leaving or

Under an agreement for a lease for three years, with an option to the lessee to have an extension of the term, the option, on the bankruptcy of the lessee, passes, with the interest, to the assignees, under the 141st section of the 12 & 13 Vict. c. 106, and seems not as a power under the 147th section.

In 1856, the Defendant agreed with G. F. B. to grant him a lease of some property for three years, and, when called on by G. F. B., to grant him a lease for three years, or for the whole of his, the Defendant's, term. In 1864, G. F. B. became

bankrupt, and his assignee sold his interest to the Plaintiff, who called on the Defendant to grant the extended term:—*Held*, on demurrer, that the Plaintiff was entitled to relief.

A proviso that a lessee shall not assign without the consent or the licence of the lessor, is not an usual covenant, and is not implied by the words, "the lease to contain all the usual covenants for protecting the interest of the lessor."

1861.
 ~~~~~  
 BUCKLAND  
 v.  
 PAPILLON.

giving up the premises previous to the expiration of the term of three or seven years, or any other term that might be granted to him, and to deliver them up in as good a condition as then existing, reasonable wear and tear excepted.

Mr. *Blaxam* entered into possession, and he remained in possession until *October*, 1864, without giving any notice or applying for an extended lease.

On the 13th *October*, 1864, Mr. *Blaxam* became bankrupt; and on the 5th of *December*, 1864, the assignee put up the bankrupt's interest in the premises for sale by auction. The Plaintiff bought it for 60*l.*, which he duly paid, and thereupon the assignee duly executed a memorandum of agreement, whereby, after reciting the previous agreement and the contract for sale, the assignee, *Pooley*, in consideration of 60*l.* agreed with the Plaintiff that he would, when required by the Plaintiff, his executors, administrators and assigns (at his and their proper costs and charges), do and execute all proper acts and deeds for the purpose of assigning and assuring the estate and interest of him, *Pooley*, as such assignee, in the premises comprised in the before-mentioned agreement, and also in an under the same agreement, as the Plaintiff, his executor, administrators and assigns, should be advised might be necessary for carrying into effect the thereinbefore recited contract for sale.

The Plaintiff, thereupon, applied to the Defendant to grant him a lease of the offices and cellars in question. The Defendant refused, and gave the Plaintiff notice to quit, and, thereupon, the Plaintiff filed this bill for the specific performance of the agreement of the 27th of *September*, 1866.

is bill the Defendant demurred, contending that there is nothing to be found in the Bankruptcy Act, which enabled the assignee to assign an option of this kind. The section which relates to this matter is section 14 of the 12 & 13 Vict. c. 106 (which is repealed or affected by the subsequent act of 24 & 25 Vict. c. 134).

1866.

BUCKLAND  
v.  
PAPILLON.

The 141st section, "all his (the bankrupt's) personal estate and effects," &c., "and all debts due or to be paid to him," &c., become absolutely vested in the assignees, by virtue of their appointment. And by the 142nd section, "all lands, tenements and hereditaments" copyhold, &c.), and "all interest to which such bankrupt is entitled in any of such lands, tenements or hereditaments," &c., "shall become absolutely vested in the assignees," &c., "by virtue of their appointment, without any deed of conveyance for that purpose."

The 147th section, which relates to powers, it is provided, "That all powers vested in any bankrupt, which he might legally execute for his own benefit, shall, after the date of his bankruptcy, be executed by the assignees, for the benefit of the creditors, in such manner as the bankrupt might have executed the same."

*Jessel* and Mr. *R. Willan* in support of the Defendant. Under the words "whenever called upon so as to require some limit of time must be placed, within which the power must be exercised. It must be restricted either to three years or to the time during which *Bloxam* was in possession of the property; here that possession ceased on his bankruptcy in *October*, 1864. This distinguishes the case from *Moss v. Barton* (a),

where

(a) *Ante*, p. 197.

1866.  
 Beckland  
 Papillon.

where the tenant had remained in possession of the property until he required the lessor to grant the extended term. Again, this is a mere option which was personal to *Bloram*; his "assignees" are not mentioned, and therefore he alone could exercise it. In this respect an option differs from an estate or an interest in an estate.

Under the 141st, 142nd and 147th sections of the 12 & 13 Vict. c. 106, which are not repealed by "*The Bankruptcy Act, 1861*" (24 & 25 Vict. c. 134), the Plaintiff has no title; for this option did not pass as "personal estate and effects" under the 141st section, or as "lands, tenements and hereditaments" under the 142nd section, nor is it a power within the 147th section. As property, the leasehold interest never vested in the assignees until they had elected under the 13 & 14 Vict. c. 106, s. 145; until then, *Bloram* remained the tenant, and he has executed no assignment to the Plaintiff. Even if the right of option comes within the 147th section as a power, still the assignees could not assign or delegate it to the Plaintiff; all they are empowered to do is to execute it as the bankrupt might have executed the same.

The words "such lease to contain all the usual covenants for protecting the interest of the said *Jos. Papillon*," would imply a proviso against assignment without the licence of the lessor, which has now become not only necessary but usual. If that be the case, it is clear, from the decisions, that the Plaintiff, who has no such licence, has no title to relief.

Lastly, the bill is defective for want of parties. *Bloram*, to whom the lease must, in the first instance, be granted, in order that the Defendant may have the benefit

benefit of his covenants, *Dowell v. Dew* (a), is a necessary party, so likewise is his assignee, Mr. *Pooley*.

Mr. *Hobhouse* and Mr. *W. W. Cooper* in support of the bill. The case of *Moss v. Barton* (b) is decisive on the point that a tenant's right of exercising the option of extending his term continues until the tenancy has terminated. Where a tenant holds over, the original terms of his tenancy continue the same as before, and this right of option was one of them. This doctrine has been acted on in the case of an option to purchase under a partnership deed after the term had expired; *Essex v. Essex* (c). The insertion of the word "assigns" was perfectly unnecessary, for the right of assignment is incident to the estate of a lessee, unless it be expressly restrained; *Church v. Brown* (d); and here the right of option is part of the estate.

The bankruptcy of *Bloxam* creates no objection to the right to specific performance, for it does not discharge the contract entered into for valuable consideration; *Crosbie v. Tooke* (e); *Morgan v. Rhodes* (f); *Brooke v. Hewitt* (g).

The right in question passed, under the Bankruptcy Act, with the property, it is similar to a right to determine a lease on notice, or to a condition to extend the interest on *A.*'s coming from *Rome*. In that view, it is not a discretion which cannot be delegated, it is like the lease itself, if the lease be not personal the option is not personal. But it may pass, under the

147th

(a) 1 Y. &amp; Col. (C.C.) 345.

(b) *Ante* p. 197.

(c) 20 Beav. 442.

(d) 15 Ves. 284.

(e) 1 Myl. &amp; K. 431.

(f) *Ib.* 435.

(g) 3 Ves. 253, and p. 255, note.

1866.

BUCKLAND  
v.  
PAPILLON.

10

SECRET

THE SECRETARY OF THE ARMY  
WASHINGTON, D. C.  
JANUARY 10, 1947  
TO THE SECRETARY OF THE ARMY  
FROM THE SECRETARY OF THE ARMY  
SUBJECT: [REDACTED]

THE SECRETARY OF THE ARMY  
WASHINGTON, D. C.

1. [REDACTED]

2. ACTION OF THE ARMY

THE SECRETARY OF THE ARMY  
WASHINGTON, D. C.  
JANUARY 10, 1947  
TO THE SECRETARY OF THE ARMY  
FROM THE SECRETARY OF THE ARMY  
SUBJECT: [REDACTED]

THE SECRETARY OF THE ARMY  
WASHINGTON, D. C.

THE SECRETARY OF THE ARMY  
WASHINGTON, D. C.  
JANUARY 10, 1947  
TO THE SECRETARY OF THE ARMY  
FROM THE SECRETARY OF THE ARMY  
SUBJECT: [REDACTED]

the lessor, did not destroy the original agreement, or enable the lessor successfully to contend that it had been waived.

1866.

BUCKLAND  
v.  
PAPILLON.

I think the only question on this demurrer is, whether this option, which belonged to the bankrupt, passed to his assignees. The proviso to grant a new lease at the option of the lessee forms part of the agreement of 27th *September*, 1856, which was entered into for a valuable consideration; it is, therefore, in my opinion, a contract made with *Bloxam* by the Defendant, the performance of which *Bloxam* might have enforced at any time before his bankruptcy, unless he had waived or abandoned it, which, as I have already stated on the facts stated in this bill, in my opinion he did not. I am of opinion, that the whole of his interest in this contract must be included in the words "personal estate and effects present and future" of the 141st section of the Act of 1849. I should have considerable doubt whether the bankrupt's option to take a lease could be held to be a power within the 147th section of that act; but I think that the option is part of the interest contained in the agreement, and that the whole of the interest of the bankrupt in that agreement is part of the personal estate of the bankrupt.

The agreement of 27th *September*, 1856, is not one which requires any skill or discretion for its performance by *Bloxam*, and it could, therefore, be assigned by him, unless an intention to the contrary can be collected from the contents of the agreement itself. If the agreement had contained a proviso that the lease should not be assigned, then I think that the option to take a new lease would not have passed to the assignee, unless with the consent of the Defendant.

1866.  
  
 BUCKLAND  
 v.  
 PAPILLOW.

In *Weatherall v. Geering* (a), Sir William Grant refused to order the intended lessors to execute such a lease, where there was a proviso against assignment without licence of the lessor, and the intended lessee had assigned his interest under the agreement, and had also taken the benefit of an act for the relief of insolvent debtors; and in his judgment Sir William Grant appears to have doubted whether the specific performance of any agreement for a lease not containing such a proviso could be enforced in favor of the assigns of the intended lessee. But, if that was his opinion, it is, in that respect, overruled by the Lord Chancellor in the case of *Crosbie v. Tooke* (b), where he enforced specific performance of such an agreement in favor of the assignee of the intended lessee who had become bankrupt, and, at the same time, he distinguished that case from the case of *Weatherall v. Geering*, by the circumstance, that, in that latter case, the lease to be granted was to contain a covenant not to assign without the licence of the lessor.

The next case, in the same volume, of *Morgan v. Rhodes* (c) is to the same effect; and this also seems to have been the principle which governed the case of *Dowell v. Dew* (d), on which the Defendant relied. In that case, a lease for fourteen years had been granted to William Dowell, which contained a proviso that the same should be forfeited, if the lessee, his executors, administrators or assigns should alien, &c. without the consent of the lessor. A short time before the determination of the lease, an agreement was entered into by the lessor with John Dowell, in whom the lease was then vested, to grant to him another lease for fourteen years

(a) 12 Ves. 504.

(b) 1 Myl. & K. 431.

(c) 1 Myl. & K. 435.

(d) 1 Y. & C. (C. C.) 345.

years "on the same terms as the last." On a suit for specific performance brought by *Thomas Dowell*, the brother and alienee of *John Dowell*, the Lord Justice *Knight Bruce*, then Vice-Chancellor, held, that the Plaintiff was not entitled to have a lease granted to him without giving to the lessors the personal liability of *John Dowell* for the due performance of the covenants. This case was brought by appeal before Lord *Lyndhurst*, as Chancellor, who affirmed the decree of the Vice-Chancellor, but (as appears by the report of it in the *Law Journal* (a) ) expressly on the ground that a clause against alienation had been inserted in the first lease, which governed the agreement with *John Dowell*. His Lordship is represented to have said:—

"The next objection is founded on the assignment without licence of *John Dowell*, the tenant, to his brother *Thomas*. If a lease had been granted in pursuance of the agreement and that lease had been assigned, it would have been a forfeiture, but such forfeiture might have been waived. The question, however, remains to be decided, whether, with reference to the object of the present suit, the same principle would apply to the agreement. It is clear that if it were not for this clause against assigning without leave, the agreement would be binding, and might be enforced by *Thomas Dowell* the assignee. The same consequence would follow notwithstanding the renewal, if leave had been previously obtained. The restraint is introduced for the benefit of the owner of the estate, and he may dispense with it if he thinks proper, either before or after the assignment; and if he does so, the tenant is in the same situation as if there was no such stipulation."

In the agreement in the case before me of the 27th  
September,

(a) Vol. 12 (Ch.), 164.



1866.  
BUCKLAND  
v.  
PAPILLON.

*September, 1856*, there is no intimation that the lease to be granted is to contain any clause against assignment, unless it be in the proviso that the lease shall contain the usual covenants for the protection of the lessor, and in the absence of the word "*assigns*." With regard to this point, I am of opinion that a proviso, that the lessee shall not assign without the consent or licence of the lessor, is not a usual covenant; and as to the absence of the word "*assigns*" from the agreement, having regard to the case of *Church v. Brown* (a), I am of opinion, that the absence of this word from an agreement for a lease (which is not I apprehend very unusual) cannot have the effect of preventing the agreement and interests under it from vesting in the assignees in bankruptcy of the intended lessee; and if it vests in the assignees in bankruptcy, it is clear that it may be assigned by them.

I am also of opinion that the instrument which purports to assign this interest from the assignees in bankruptcy to the Plaintiff is sufficient for that purpose, and that the right to enforce this option is, upon the statements contained in the bill, vested in the Plaintiff.

I am of opinion, therefore, that this demurrer must be overruled.

(a) 15 *Ves.* 258.

---

NOTE.—Affirmed by Lord *Chelmsford*, L. C., 23 Nov. 1866.—*36 L. J. (Ch.)* 81.

---

1865.

SCOTT v. KEY.

THE testator bequeathed two-thirds of his property  
*"to his dear wife Margaret Scott, to be at her  
 sole and entire disposal for the maintenance of herself  
 and such child or children as he might leave by her."*  
 Secondly, he bequeathed the remaining one-third to  
 three trustees, to pay 300*l.* a year to his (the testator's)  
 father and mother, and he proceeded as follows:—On  
 their deaths, "the balance remaining of the principal  
 and interest of the said one-third of my property to go  
 to my dear wife, being well assured that she will hus-  
 band the means that may be left to her by me with every  
 prudence and care, for the sake of herself and any chil-  
 dren that I may leave by her."

The testator died in 1842, leaving his widow and one  
 child, a daughter, who married in 1862. The testator's  
 parents were dead, and the question arose as to the  
 interests of the mother and daughter under the will.

The Plaintiff, the widow, submitted that she was  
 entitled to the whole of the estate of the testator, or, at  
 all events, to one undivided third part thereof.

Mr. C. T. Simpson, for the widow, argued that there  
 was an absolute gift of the two-thirds to the widow,  
 subject to a discretionary trust to support the daughter,  
 which had ceased on her marriage. Secondly, that the

July 11, 12.  
 Bequest to  
 widow of two-  
 thirds of the  
 residue, "to  
 be at her sole  
 and entire  
 disposal, for  
 the main-  
 tenance of  
 herself and  
 such child or  
 children as I  
 may leave by  
 her :"—*Held*,  
 that the widow  
 had an un-  
 controlled  
 power over the  
 income so  
 long as the  
 children were  
 maintained,  
 and that the  
 right of the  
 children to  
 maintenance  
 did not cease  
 at twenty-one.

Bequest of  
 the principal  
 and interest of  
 one-third of  
 the residue to  
 a widow,  
 "being well  
 assured that  
 she will  
 husband the  
 means that  
 may be left to  
 her by me  
 with every  
 prudence and  
 care, for the  
 sake of herself  
 and children :"  
*Held*, that this raised no precatory trust, and that the widow took absolutely.

and children :"—*Held*, that this raised no precatory trust, and that the widow took absolutely.

1865.

SCOTT  
v.  
KEY.

widow was absolutely entitled to the remaining one-third, there being no precatory trust created by the expression, that she would manage the property given to her "with prudence and care."

He cited *Carr v. Living (a)*; *Camden v. Benson (b)*.

Mr. *Edward Smith* and Mr. *Rendall*, for the daughter, argued that there was a trust affecting the whole for the maintenance of the daughter.

They cited *Woods v. Woods (c)*; *Crockett v. Crockett (d)*; *Gully v. Cregoe (e)*; *Hart v. Tribe (f)*; *Raihes Ward (g)*.

[*The MASTER of the ROLLS.* I think the widow entitled to one-third, and I wish to hear the Plaintiff as to whether she is not entitled to the two-thirds for life.]

Mr. *Simpson* in reply referred to *Robinson v. Tickell (h)*; *Hamley v. Gilbert (i)*.

*The MASTER of the ROLLS.*

My present impression is, that, as to the two-thirds, all that the widow takes is an absolute interest in the income of that fund during her life.

With respect to the one-third I am satisfied she takes an absolute interest, for it is to go to her, the testator being

(a) 28 *Beav.* 644, and 33 *Beav.* 474.

(b) 4 *L. J. (Ch.)* 256.

(c) 1 *Myl. & Craig*, 401.

(d) 2 *Phillips*, 553.

(e) 24 *Beav.* 185.

(f) 32 *Beav.* 279, and 1 *D. G. J. & S.* 418.

(g) 1 *Hare*, 445.

(h) 8 *Ves.* 142.

(i) *Jacob*, 354.

being assured that she will husband it with care and prudence for the sake of herself and the children.

1865.

SCOTT  
v.  
KAY.

I do not think that the trust of the two-thirds terminates with the infancy or marriage of the children, *i.e.*, it is given to the widow at her sole and entire disposal for the maintenance of herself and children. She is to judge how much of it is necessary to maintain them. But can that be effected if the two-thirds are given to her absolutely? She might then dispose of the whole fund, and there would be nothing remaining for the support of the children.

If a child attained twenty-one, and had no means of support, would not the widow be bound to maintain such child? If this child attained twenty-one, and had no means of support, would she not be entitled to maintenance? So if she married, and the Plaintiff was of opinion that she did not then require support, but the child afterwards became a widow and had no means of support, surely she would be entitled to some means of support. I do not know how to give effect to this, except by saying, that *Margaret Scott* has an absolute life interest in the fund, subject to providing for the necessary maintenance of the children.

With respect to the one-third, it is given to her absolutely; for the expression of the testator's assurance that she will husband her means is a mere piece of advice, and I am satisfied, without going into those cases which resemble and are cited in *Knight v. Boughton* (a), that this is not a precatory trust which the Court would enforce as to the one-third. I am disposed to say that the Court is of opinion that, at all events, she take the two-thirds for life absolutely, it being at her sole discretion how she and

(a) 12 Beav. 312.

1865.

SCOTT  
v.  
KEY.

and her child are to be maintained, and then I shall give a general liberty to apply without expressing what the rights after her life may be. I will consider the case.

---

*The MASTER of the ROLLS.*

July 12.

In this case, I have no additional observations to make. I am of opinion, after referring to all the cases, that they confirm the view I took at the conclusion of the argument with respect to the one-third, that it clearly belongs to the widow, and that the words do not create any trust at all. There is a gift of the principal and interest, and the rest are general words expressive of an assurance that she will husband her means for the sake of herself and children, but there is no trust for the children. This is borne out by a series of cases, of which *Knight v. Broughton* is one of the last.

With respect to the two-thirds, I am of opinion that she has an uncontrolled discretion over the income, and may apply it, as she thinks fit, for the maintenance of herself and children. No doubt she will maintain herself; and so long as the child is maintained, the Court cannot interfere, but the interest of the child does not terminate at twenty-one, because events may occur which may make it essential that she should have a maintenance. The widow does not take an absolute interest in the fund for life, for the child must be maintained. I express no opinion of the rights after the widow's death, but I shall give liberty to apply.

---

DECREE.

Declare that the Plaintiff is entitled to one-third of the residuary estate of the testator, and to the income of the remaining two-thirds of the said estate, so long as the testator's child is maintained, and that the Plaintiff has uncontrolled power over the disposition of the said income so long as the said child is maintained.—*Reg. Lib.* 1865, B. fol. 1668.

1866.

## PERCY v. PERCY.

**T**HE testator died in 1847, having by his will devised the residue of his real and personal estate to his executors, upon trust, to convert and invest at interest, and stand possessed thereof upon the following trusts :—

In trust to set apart and invest so much money as would produce the clear annual sum of 200*l.*, and pay the said annual sum to his, the testator's, wife *Susanna Percy* during her life, for her separate use, and stand and be possessed of the residue of his real and personal estates, which should not be wanted for raising the said annual sum of 200*l.*, and also of the whole of his said real and personal estates, after the decease of his said wife (including the sum to be set apart for raising the said annual sum of 200*l.* for her) upon trust for certain persons therein named.

*Susanna Percy* died in 1852.

The Chief Clerk found as follows :—

The rents, profits and income of the real and personal estate, received during the lifetime of *Susanna Percy*, were insufficient for the payment of the annuity in full. The executors made payments to her amounting in the whole to 708*l.* 5*s.* 1*d.* on account of the annuity, which sum exceeded the income actually produced from the real and personal estate during her life by the sum of 395*l.* 14*s.* 5*d.*, but fell short of payment in full of the annuity by 186*l.* 10*s.* 3*d.*, which he found remained due to

Jan. 19.

A testator directed his trustees to convert the residue of his real and personal estate, and to invest so much money as would produce 200*l.* a-year, and to pay it to his wife during her life. And he gave the residue, not wanted for that purpose, to other persons. The widow survived five years, and the deficiency of the income of the residue to pay her annuity amounted to nearly 700*l.* Held, that the deficiency was payable out of the corpus.

1868.  
 ~~~~~  
 Percy
 v.
 Percy.

to the estate of *Susanna Percy* in respect of the arrears of the annuity. But he reserved for the consideration of the Court the question whether the 186*L.* 10*s.* 3*d.* was due and payable to her estate.

The question was whether the annuity was payable out of the *corpus*.

The case was argued by Mr. *Stallard*, Mr. *De Gea* and Mr. *Hardy*.

The MASTER of the ROLLS held, that the legal personal representatives of *Susanna Percy* were entitled to have the arrears of the annuity of 200*L.* paid out of the *corpus* of the residuary personal estate of the testator, and that if such residuary personal estate should not be sufficient, out of the produce of the real estate of the testator.

NOTE.—See the cases in the note to *Howarth v. Rothwell*, 30 *Ben.* 519.

1866.

Re LATHROPP'S CHARITY.

THE *North Staffordshire Railway Company*, which was subject to the provisions of "*The Lands Clauses Consolidation Act, 1845*," took compulsorily some portion of the land belonging to the charity and paid the purchase-money into Court.

After this, the Court authorized the trustees to improve the supply of water to the town of *Uttoxeter* and to raise a sufficient sum for that purpose.

The trustees now presented a petition for the payment out of Court of this fund for the purposes sanctioned by the Court, and they asked that the company might pay the costs of the application.

Mr. *Wickens* in support of the petition. The company, who have taken the land under the powers of the act, are bound to pay the expenses of obtaining it out of Court. Substantially, what is asked is the payment to the rightful owners, and its application is a matter of no importance. The case of *Re Oxford, &c., Railway* (a), which will be cited, was decided on the authority of *Re Buckinghamshire Railway Company* (b), but the point has since been before Vice-Chancellor *Wood*, who has decided, in *Re Incumbent of Whitfield* (c), that where the purchase-money for the glebe had been laid out in building the parsonage, the costs of obtaining payment

Jan. 20, 22.

The 80th section of the 8 Vict. c. 18 (*The Lands Clauses Consolidation Act*) is to be construed liberally.

A railway company took lands belonging to a charity, and the Court authorized the investment of the purchase-money in water-works. Held, that the company must pay the costs of a petition for payment out of the purchase-money.

(a) 27 *Beav.* 571.
(b) 14 *Jur.* 1065.

(c) 1 *John. & Hem.* 610.

1866.

Re
LATHROPP'S
CHARITY.

payment ought properly to be borne by the company. He cited *Hodges on Railways* (a).

Mr. W. J. Bovill for the company. This is an application for payment to the waterworks, and it is not such an investment as is authorized by the 80th section of the act (b), and, therefore, the costs are not payable by the company. The case is governed by *Re Buckinghamshire Railway Company* (c), followed by *Re Oxford &c., Railway Company* (d). The case of *Re The Incumbent of Whitfield* (e) is inapplicable, for there the application of the money was one authorized by the act, but the act sanctions no investment in waterworks.

Mr. Wickens in reply. This must be treated as an investment. If a sum had been invested in a mortgage, the application for its payment would properly be payable by the company, who have rendered the application necessary. This fund is asked for for the same purpose.

The MASTER of the ROLLS.

Jan. 22.

After examining the cases on this subject, I think that, in this case, according to the act, the company ought to pay the costs of the petition. In the case of *The Buckingham Railway Company*, the Lord Chancellor held, that a company was not bound to pay the costs of a petition for the investment of the money laid out in the erection of buildings, and I followed that decision in *Ex parte Melward* (f). Since then, the matter has

(a) Page 456 (3rd ed.)
(b) 8 Vict. c. 18.
(c) 14 Jur. 1065.

(d) 27 Beav. 571.
(e) 1 John. & Hem. 610.
(f) 27 Beav. 571.

has come before the Vice-Chancellor *Wood*, in the case of *The Incumbent of Whitfield* (a), in which case he thought that, under the 80th section of the Lands Clauses Consolidation Act (8 *Vict.* c. 18), the company was bound to pay the costs.

1866.

Re
LATHROPP'S
CHARITY.

I have again referred to that act, and I think that the 80th section does apply to this case. I think the section is a remedial one and ought to be construed liberally, and though it may be true, that when much expense is occasioned by an application for leave to lay out the money in the erection of buildings, the company ought not to be called upon to pay the costs, and that there ought to be an apportionment; still, as in fact is the case here, where the petition is little more than an application to pay out the money to persons or a corporation which the Court has declared to be entitled to receive it, in such a case, it must, I think, be considered as partaking of that character and be one which the company must pay for.

In truth, here it is either a payment to the charity or it is an application to have the money invested in certain waterworks. In either case, I think that the railway company must pay the costs of the petition.

(a) 1 *John. & Hem.* 610.

Reg. Lib. 1866, B., fol. 220.

1866.

KENYON by Jones (Next Friend) v. KENYON.

KENYON by Jane Kenyon Widow (Next Friend)
v. KENYON.

Feb. 8.

Two suits had been instituted on behalf of infants for the same purpose, and a decree had been obtained in the second. Upon motion to stay the first suit, the Court ordered it to be stayed, giving liberty to the next friend in the second to apply for the conduct of the first.



THESE two suits were instituted on behalf of infants for the same purpose. The second suit, being a friendly one, a decree had been obtained in it before the first could be brought to a hearing.

A motion was now made to stay the proceedings in the first suit.

Mr. Selwyn and Mr. C. Rompell in support of the application.

Mr. Jessel and Mr. Shepperd, *contra*, asked that the next friend in the first suit might be substituted in the suit. *Nanney v. Wynn* (a); *Taylor v. Oldham* (b); *Belcher v. Belcher* (c).

The MASTER of the ROLLS.

I must stop the first suit.

I accede to the argument that it is often for the benefit of an infant, that a suit on his behalf should be conducted by a next friend, not friendly to the Defendant, who is an accounting party. But I should like to know more about this case, which I shall in Chamber—

I shall

(a) 2 Jur. (O. S.) 962 (reversed by Lord Cottenham).

(b) Jacob, 527.

(c) 2 Drew. & Sm. 444.

I shall direct the costs of the first suit to be costs in the second, and give the next friend in the first suit liberty to go in and ask to be allowed the conduct of the second suit.

1866.

KENYON
v.
KENTON.

MULLINS v. HUSSEY.

Feb. 12.

THIS was a motion to discharge *John Parr*, a purchaser under the Court, from his purchase, (it having been determined that there was no valid title,) and to have his costs paid by Mr. *W. Stephens*, a Defendant, to whom the Court had given the conduct of the sale.

Where, upon a sale under the Court, the title turned out bad:—
Held, that the purchaser, on being discharged, was not entitled to his costs as against a Defendant to whom the conduct of the sale had been committed by the Court. But his rights, as against any fund which might come into Court, were reserved.

In 1863, the property was ordered to be sold, and the Defendant Mr. *Stephens*, who was a mortgagee, was directed to have the conduct of the sale.

The property was sold by auction in the same year, but in 1865 the Chief Clerk certified that a good title could not be made. The Master of the Rolls was of a different opinion, but his decision was reversed in December, 1865, by the Lords Justices.

Mr. *Hobhouse* and Mr. *Surrage* for the purchaser. When a purchaser under the Court is discharged, the rule is, if there be a fund in Court, to direct payment out of such fund; *Perkins v. Ede* (a). But if there be no fund in Court, the Plaintiff is ordered to pay them, without prejudice to how they are ultimately to be borne; *Smith v. Nelson* (b); *Berry v. Johnson* (c). Here, the Plaintiff

(a) 16 Beav. 268.

(b) 2 Sim. & St. 557.

(c) 2 Younge & C. (Exch.) 564.

1866.
 ~~~~~  
 MULLINS  
 v.  
 HUSSEY.

Plaintiff has not, as is usual, the conduct of the sale, and he is abroad, and *Stephens*, who has taken upon himself the conduct of the sale, stands in his place, and in that of an ordinary vendor. He has voluntarily made himself liable to the purchaser. He is also a mortgagee in possession, who having applied for and obtained the conduct of the sale, has sold the estate, without the ability of making a good title to it; he ought to pay the purchaser's costs.

[*The MASTER of the ROLLS.* I do not at present see my way to making this Defendant pay the costs. I think I ought to reserve the costs as against any fund which may come into Court in this suit.]

Mr. *Jessel* and Mr. *Rawlinson* for *Stephens*. Every book of practice is against this application. *Seton on Decrees* (a); *Dart on Vendors* (b); *Sugden on Vendors* (c).

There is no contract by which the Defendant has rendered himself liable at law, why should the liability be extended in equity? The sale is by the Court, and not by any particular party to the suit.

Mr. *Beales* for the Plaintiff.

---

*The MASTER of the ROLLS.*

I must order the purchaser to be discharged from the purchase, and direct his costs, charges and expenses, properly

(a) Page 617 (2nd ed.)  
 (b) Page 763 (3rd ed.)

(c) Page 107 (14th ed.)

properly incurred, occasioned by his bidding for the property, and also his costs of the reference as to title, and of all proceedings consequent thereon (but not including the costs of the appeal to the Lords Justices), and the costs of the application, to be taxed. I must reserve the payment of them, and give him liberty to apply for payment out of any funds that may be paid into Court to the credit of the case, and give him a stop order.

1866.  
MULLINS  
v.  
HUSSEY.

---

*Reg. Lib. 1866, B., fol. 330.*

---

BRIGHOUSE v. MARGETSON.

ON a motion for an injunction and receiver, the Defendant agreed that the cause should be at once heard, and that a decree should be taken for a dissolution of the partnership from a given date, and for accounts and inquiries. The Master of the Rolls, thereupon, made the decree. It being necessary to have the written consent of the Defendant's solicitor to set down the cause, the Plaintiff applied for it, but after a delay of two days the Defendant's solicitor wrote to the Plaintiff's solicitor to say that the Defendant had since become bankrupt, and that he had no longer power to sign the consent.

*Feb. 8, 15.*  
Upon a motion for an injunction, the Defendant consented to an immediate decree, but he became bankrupt before the decree had been drawn up, and his written consent to set down the cause could not be obtained. The Court made the order for setting down the cause and dispensed with the consent.

Mr. *Jessel*, for the Plaintiff, asked that the decree might, notwithstanding, be drawn up.

*The MASTER of the ROLLS.*

The decree is that of the Court. I will add, that the Defendant,

1866.

BRIGHOUSE  
v.  
MARGETSON.

Defendant, by his counsel, having consented that the cause should be put in paper, the Court ordered the cause to be set down for hearing. I consider that I made an order to set it down, and I will order it to be set down *nunc pro tunc*.

---

Feb. 17.

## WHITE v. STEWART.

A person served with the decree afterwards married:—  
*Held*, that the proper way of bringing the trustees of her marriage settlement before the Court was by service of the decree.

A LADY, who was not a party to the suit, but had been served with notice of the decree, under the 15 & 16 *Vict.* c. 86, s. 42, afterwards married. The question was, how the trustees of her marriage settlement ought to be brought before the Court, and whether by an order of revivor or supplement, under the 15 & 16 *Vict.* c. 86.

Mr. *Eddis* for the Plaintiff.

*The MASTER of the ROLLS.*

The proper course seems to me to be, to serve them with the decree, in the same way as was done to the lady herself, whose interest they represent.

---

1865.

## THE ATTORNEY-GENERAL v. THE MARKET-BOSWORTH SCHOOL.

Nov. 20.

SOME of the circumstances relating to this charity will be found reported in the case of *The Attorney-General v. Dixie* (a). The subject of the charity was a Church of *England* School founded by Sir *Wolstan Dixie* at *Market-Bosworth*, in *Leicestershire*. The present state of the school requiring a new scheme of management, one was prepared under the decree of the Court, in this suit, dated *March*, 1864. This scheme proposed (Art. 33) "that the school should be open to the children of parents of *all religious tenets*," and (Art. 38) that religious instruction should be given, "by instructing in the catechism and doctrines of the Church of *England*, to those boys whose parents should not object, in writing, to their receiving such instruction." It also provided (Art. 58), that "the subjects of instruction, in the school, should be in the principles of the Christian religion, according to the doctrines of the Church of *England*" (subject as before mentioned), &c.

Authority given by the Court to apply to parliament to authorize a scheme admitting the children of Dissenters to the benefit of a Church of *England* school. And, upon application to parliament, such authority was granted.

This scheme could not be carried into effect, except by means of an act of parliament, and the *Attorney-General* asked to be at liberty to apply to parliament for an act to carry into effect this scheme for the future regulation and management of the grammar-school.

Sir *Roundell Palmer* (*Attorney-General*) and Mr. *Hobhouse* in support of the petition.

Mr.

(a) 13 *Ves.* 519.



1865.

Mr. *Selwyn* and Mr. *W. Pearson* for the patron.

ATT.-GEN.  
v.  
MARKET  
BOSWORTH  
SCHOOL.

Mr. *Woodroffe*, for the governors, resisted the application to change the religious character of the school. He cited *Re Ilminster School* (a); *Baker v. Lee* (b); and see *Attorney-General v. Clifton* (c).

*The MASTER of the ROLLS.*

This must be treated as a Church of *England* charity, and I could not by possibility sanction any scheme that admitted of any other instruction: but the object proposed has failed, and cannot now be carried into execution. Notwithstanding the statement of Lord *Eldon* in 1810 (d), the school has gone from bad to worse, and the question now is, what is to be done? The Charity Commissioners, the *Attorney-General*, and the heir of the founder, concur in saying, that this state of things cannot continue, and that it is desirable that a fundamental alteration should be made in the charity, but this cannot be made by the Court. No reported case, therefore, has any application to the present, the question being, not whether this is a Church of *England* charity, but whether, being one, it is desirable to apply to parliament for a different destination of the revenues.

I am of opinion that an application to parliament is desirable for extending the scope of instruction, and, if possible, to admit the children of Dissenters.

(a) 2 *De G. & J.* 535.

(b) 8 *H. of L. Cas.* 495.

(c) 32 *Beav.* 596.

(d) 13 *Ves.* 519.

---

NOTE.—See *Reg. Lib.* 1865, A., fol 2493, and *Reg. Lib.* 1866, A., 248. The act was applied for and received the Royal Assent on the 6th of August, 1866. The act is intituled "An Act for the better Regulation of the Market Bosworth School" (29 & 30 Vict. c. viii., private).

1866.

ASPINALL *v.* DUCKWORTH.

Feb. 23.

**T**HE testator's personal estate was insufficient for the payment of his debts, but, by his will dated in 1836, he devised his real estate to trustees, upon trust, after the death of his wife, to sell and hold the produce on the following trusts:—

“ Upon trust to divide the same unto and equally amongst my nephew *John Aspinall*, and the children of my late sister *Elizabeth Bullock*, or their respective executors, administrators or assigns, as tenants in common. Provided always nevertheless and I do hereby expressly direct, that in case any of my nephews or nieces shall die before me and leave issue him or her surviving, the estate and interest which such nephew or niece would, respectively, if living, have taken in the produce or monies to arise from my said freehold, copyhold, customary, leasehold and personal estates, *shall not thereby lapse*, but, in such case, shall be held in trust for the executors or administrators of such nephew or niece, respectively, to be held and applied as part of the personal estate of such nephew or niece respectively.

A testator bequeathed a fund to his nephew *A.* and the children of his late sister *B.*, as tenants in common; but, in case any died before the testator leaving issue, his share was not to “lapse,” but go to his executors as part of his personal estate. Three of the children of *B.* died before the testator and left no issue:—*Held*, that there was no lapse, but that the whole went to the other members of the class.

The testator died in *August*, 1863, and his wife in *October* following.

At the date of the testator's will, there were six children of his sister *Elizabeth Bullock*; but they all predeceased the testator. Three of them died without issue, and the other three left children.

Mr.

1866.  
  
 ASPINALL  
 v.  
 DUCKWORTH.

Mr. *Cadman Jones*, for the Plaintiff *John Aspinall*, argued that no part of the fund had lapsed, the bequest being to a class, between whom the fund was to be divided. He cited *Havergal v. Harrison* (a); *Hall v. Robertson* (b).

Mr. *Finch* for the legal personal representative.

Mr. *Macnaghten*, for two co-heirs. The use of the word "lapse" shews that the gift is not to a class but to the individuals, and in such a way that it would lapse by the death of the legatee in the testator's lifetime. The consequence is, that three-sevenths of the fund has lapsed for the benefit of the co-heirs. He cited *Stanhope's Trusts* (c); *Ackerman v. Burrows* (d).

*The MASTER of the ROLLS.*

I think the case clear, and the meaning distinct. The testator, it appears, lived long after he had executed his will, for the will is dated in 1836, and he died in 1863. The result was, that his nephews and nieces died before him.

The first gift is to the Plaintiff and the children of the testator's deceased sister, "or their respective executors, administrators or assigns, as tenants in common." If the will had stopped there, there would no question that it was a gift to a class, and that, if one of them happened to die in the testator's lifetime, the survivors would take the whole, and if only one survived, he would take the whole fund. That being clear, the only question is, how has the testator subsequently altered it? He has added this proviso:—that in case any nephew

(a) 7 *Beav.* 49.

(b) 4 *De G. M. & G.* 781.

(c) 27 *Beav.* 201.

(d) 3 *Ves. & B.* 54.

nephew or niece should die before him and leave issue, the interest which he would have taken, if living, shall not lapse but become part of such nephew's personal estate. I concur that the word "lapse," in its technical sense, is not what the testator meant, and that he probably meant "fail." It is quite clear, that independently of this proviso the survivors, if any, would have taken the whole, and that the shares of those who died before the testator would have failed. But the testator adds, that if the nephew or niece who died before him left issue surviving, the executors of such nephew or niece were to be placed in exactly the same situation, as if the parent had survived.

1866.  
ASPINALL  
v.  
DUCKWORTH

If I were to give a technical meaning to the word "lapse," I should hold that this was a division into sevenths, and that it was given individually, and that as three died without issue in the testator's lifetime, there was a lapse of three-sevenths.

But I am of opinion that the testator did not intend any lapse, that the fund is divisible into fourths, and that the Plaintiff and the representatives of the sister's three children who predeceased the testator and left children take one fourth share.

DECREE.

I declare that the monies arising from the sale of the testator's free-estate are divisible in fourths between the testator's nephew John Aspinall and the personal representatives of the three children of the testator's sister Elizabeth Bullock who died in the testator's lifetime leaving issue. Reg. Lib. 1866, A., fol. 477.

1866.

## BURMESTER v. MOXON.

Feb. 14.

The Court, in making a foreclosure decree, gave liberty to any party to apply in Chambers for a sale.

**T**HIS was a foreclosure suit instituted by the first mortgagee against the mortgagor and subsequent incumbrancers. The second mortgagee asked for a sale, but he objected to make a deposit in Court. This was resisted by the Plaintiff.

*Mr. Baggallay* for the Plaintiff.

*Mr. Selwyn* and *Mr. Swayne* for the Defendants. See 15 & 16 Vict. c. 86, s. 48.

*The MASTER of the ROLLS.*

The Court has great difficulty in dealing with these questions. When the mortgage is large, the mortgagee is sometimes able to get the estate for less than its value. But, on the other hand, the first mortgagee is not to be kept out of his money during the pendency of a suit for the specific performance of a contract for selling the mortgaged premises. Even without such a suit there are various other proceedings which might considerably delay the completion of a sale. The difficulty might be met by the deposit by the subsequent incumbrancer of a sufficient sum in Court. This being declined, I think I ought to see and judge for myself in Chambers whether the title is a difficult one or not, which I shall be able to ascertain in settling the conditions of sale and reserved bidding.

I think the proper decree is, to direct a common foreclosure

closure, and give the Defendants liberty to apply in Chambers for a sale of the property, on such terms and on payment of such a sum of money into Court as the Judge shall think fit.

1866.  
BURNMASTER  
v.  
MOXON.

If I should be satisfied that there is no great difficulty in the title, and if a sum be deposited in Court sufficient to protect the first mortgagee, I should be disposed to direct a sale in Chambers.

---

DECREE.

After the common foreclosure and redemption decree, the decree proceeded, "And any of the parties interested are to be at liberty to apply in Chambers for a sale of the said hereditaments upon such terms as the judge shall direct." *Reg. Lib.* 1830, *A. fol.* 351.

---

*Re* TAYLOR.

DAUBNEY *v.* LEAKE.

Feb. 9.

**I**N this case the residue was divisible among the first cousins of the testatrix, twenty in number. They had all, except the Plaintiff *Daubney*, been served with the decree and had obtained liberty to attend (a).

Residuary legatees, served with the decree and having liberty to attend, being very numerous, the Court declined allowing them more than one set of costs of attending the taking the accounts.

On the cause coming on for further consideration, they all asked for their costs, including those of taking the accounts. But—

*The MASTER of the ROLLS* declined to give to each of these parties the costs of attending to take the accounts and he ordered as follows:—That the costs of Plaintiff and Defendant of this matter and suit, and of all parties having

(a) 15 & 16 *Vict. c.* 86, s. 42, *Rule* 8.

1866.

Re  
TAYLOR.

having liberty to attend of this matter and suit, be taxed as between solicitor and client, "except that (as to the costs of taking the accounts) the said parties having liberty to attend were to have, between them, one set of costs as between solicitor and client."

*Reg. Lib. 1866 B., fol. 529.*

## COLLETT v. COLLETT.

Feb. 10, 15.

A condition of marriage with consent: *Held*, subsequent and not precedent, and its performance having become impossible, by the act of God, was dispensed with.

A testator gave a share of his residuary real and personal estate to his daughter, her heirs, executors, administrators and assigns, to be paid at twenty-one or on her day of marriage, provided it should take place with the consent of his widow. There was a gift over in case of her death "without having attained twenty-one years or been so married as aforesaid:"—*Held*, that the consent was a condition subsequent, and that the daughter, having married without such consent (her mother being dead at the time), had a vested interest, and that her share ought to be transferred to the trustees of her settlement, though she was still an infant.

THE testator, by his will dated in 1854, gave his real and personal estate to trustees in trust to pay an annuity to his widow for life, and subject thereto, upon trust "as to one equal fourth part thereof to and for the benefit of his dear child, *Helena Parker Collett*, her heirs, executors, administrators and assigns;" and as to the other three-fourths in trust for his three other children. And he declared, that such fourth part or share of each of them, his said four several above-named children, should become payable to each of them respectively as and when they should each respectively attain her, his or their respective ages of twenty-one years, or days or day of marriage, *provided such marriage should take place with the consent of his wife*, whom he thereby appointed to be guardian of each of his aforesaid four children. And he declared, that in case of the death of either of them, his said four children thereinbefore named, without having attained the age of twenty-one years, or been so married, as aforesaid, then the fourth share so given, devised

devised and bequeathed, to or in trust for such of them, as should so die, should be held in trust for, and belong to, the others or other, or survivors or survivor of them, his said four children, as aforesaid. And the testator declared that, in the meantime and until each of them, his said four children, should attain the age of twenty-one years or be married as aforesaid, it should be lawful for his trustees to accumulate the income. And he directed that out of the annuity given to his wife, she should maintain, keep, clothe and educate his said four children until they should so, as aforesaid, become respectively entitled to the fourth part or share thereinbefore given and provided for them. "And in case of the death of all of them, his said children, without living to attain the age of twenty-one years or to be married," then he gave his real and personal estate to his wife.

1866.

  
COLLETT  
v.  
COLLETT.

The testator died in 1855, and his widow died in the following year (1856).

In *July*, 1865, the testator's daughter *Helena*, who was still an infant, married Mr. *Lloyd* with the consent of her guardians and of the Court, and she, her husband and trustees executed a settlement of her real and personal property under the provisions of Sir *Richard Malins'* Act (18 & 19 *Vict.* c. 43). Her mother being dead at the time, it was impossible to obtain her consent to the marriage.

A petition was now presented by Mr. and Mrs. *Lloyd* and the trustees of their settlement for the transfer of one-fourth of the property to the trustees of the settlement.

Mr. *Selwyn* and Mr. *Lewin* in support of the petition. The share is vested in the first instance, and the super-added



1866.  
  
 COLLETT  
 &  
 COLLETT.

added condition is a condition subsequent, the performance of which has, by the act of God, become impossible. The legatee is therefore discharged from its performance. They cited *Graydon v. Hicks* (a); *Peyton v. Bury* (b). The limitation over is not in the alternative, and the word "or" must be read "and;" *Grant v. Dyer* (c).

Mr. Cracknall, *contra*. This condition is precedent: = *Knight v. Cameron* (d); *Davis v. Angel* (e); *Jarman on Wills* (f). It is a gift either at twenty-one or on a marriage with consent, and therefore the Petitioner is not as yet entitled to a transfer. *Egerton v. Lord Brownlow* (g) was also referred to.

Mr. Hardy for the trustees.

---

*The MASTER of the ROLLS.*

Feb. 15. The question on this petition is, whether the share of the Petitioner Mrs. Lloyd, under her father's will, in case she should die under twenty-one, has become forfeited by reason of her marriage with her present husband, not having previously obtained the consent of her mother for that purpose, which was impossible, as her mother had previously departed this life.

I think that the question depends upon whether this condition was a condition precedent or a condition subsequent, and I think that it is a condition subsequent. I think it clear beyond controversy, that this was a legacy vested in Mrs. Lloyd immediately on the death of her father,

- (a) 2 Atk. 16.
- (b) 2 Peere Wms. 626.
- (c) 2 Dow. 87.
- (d) 14 Ves. 389.

- (e) 31 Beav. 223.
- (f) Ch. xrv.
- (g) 4 H. of L. Cas. 1.

father, liable to be divested in case she died under twenty-one without having been married with the consent of her mother.

1866.

  
COLLETT  
v.  
COLLETT.

I concur with the observations of Mr. *Lewin* that the word "or" in the gift over must be read "and."

This being so, it follows conclusively that the condition, on the fulfilment of which the legacy was to become absolute, and on the nonfulfilment of which the share of the Petitioner was to go over, was a condition subsequent.

This circumstance, I think, distinguishes this case from that of *Knight v. Cameron* (a), which was relied upon by Mr. *Cracknall*, in which I think that there was not a vested legacy, and there was an insuperable direction that the condition must be performed to qualify the person to become entitled to the legacy. Here the legacy is given at once to the legatee, but it is to go over if the condition be not performed, that is, it vested at once, subject to be divested if the condition be not performed.

It is true, as Mr. *Cracknall* observed, that if this petition had been delayed for two or three years when, in all probability, this lady will have attained twenty-one, the question would not have arisen; but the Petitioners are entitled to have the question decided at once, and, if the Court should be of opinion that they are right, to have the money applied according to the trusts of the settlement which has been approved of by the Court.

I have therefore considered the case as carefully as I could, and I am of opinion that, this being a condition subsequent,

(a) 14 Ves 389.

1866.  
COLLETT  
v.  
COLLETT.

subsequent, the death of the mother dispenses with the necessity of the compliance with that condition, and that the legacy does not go over because of such compulsory omission.

It is true that, occasionally, a doubt has been expressed whether, in the case of a gift over, the gift over would not take effect, if the condition, though a condition subsequent, were not performed specifically, whatever might be the reason of the failure. But the case of *Graydon v. Hicks* (a) is an authority to shew, that the gift over will not take effect, if the performance of the condition has become impossible by reason of the act of God; and I think that this is the true and proper conclusion to be drawn from the cases which decide, that, when the performance of the condition *in toto* has not taken place because the performance of a portion of the condition has become impossible through no act or default of the person who had to perform it, the performance of that portion of the condition will be dispensed with.

Here it is reasonably certain that the mother, if she had lived, would have given her consent to this marriage; one eligible in all respects, approved of by the friends and guardian of the lady herself, and sanctioned by the Court. She has therefore performed the condition as far as it was possible for her to do so, but the consent of the deceased mother, of course, could not be procured. I am of opinion that, as the ultimate gift over cannot take effect, inasmuch as the event on which it is to take place is the death unmarried of all the daughters, the interest of the Petitioners has become absolute, and that they are entitled to an order as prayed.

(a) 2 Atk. 16.

1865.

*Re* TICHENER.

Dec. 9, 11, 13.

**T**HE question on this petition was, whether *Rhodes* had given notice of his incumbrance on a trust fund to *Gruggen*, the trustee; and, secondly, whether the fund was in the order and disposition of the bankrupt.

Parol notice given to a trustee of an incumbrance on the trust fund is sufficient; but a statement to a trustee, in a casual conversation, is insufficient notice to him.

Mr. *Osler* for the assignees.

Mr. *W. Pearson* for *Rhodes*.

Mr. *Woodroffe* for *Gruggen* (the trustee) and for another incumbrancer.

A mortgagee of a trust fund gave no notice to the trustee until after the mortgagor's bankruptcy; but he gave notice before the assignees had given notice to the trustee of their right:—*Held*, that the trust fund was in the order and disposition of the bankrupt and belonged to the assignees.

*Smith v. Smith* (a); *Browne v. Savage* (b), were cited.

*The* MASTER of the ROLLS.

There can be no question that a verbal notice is sufficient, but a statement in a casual conversation with the trustee will not be sufficient. There are various circumstances which makes one look very unfavorably on *Rhodes'* case. He neither mentioned the exact sum, nor did he think that any notice to the trustee was necessary. This looks very much as if no distinct notice was ever given by him to the trustee. The burthen of proof, in all these cases, lies on those who allege they gave notice, and where mere verbal notice has been given, it is always a difficult thing to prove or disprove it.

*The*(a) 2 *Crompt. & M.* 231.(b) 4 *Drew.* 640.

1865.

*The MASTER of the ROLLS.*

Re  
TICHENER.  
Dec. 11.

I am of opinion that the fact of notice having been given to the trustee is not proved, the burthen of proof lying on the person who alleges that he gave it.

The general rule unquestionably is, that the affidavit of any person, in his own favor, unsupported by the testimony of any other person or by any collateral circumstances, cannot be considered as conclusive in his favor. Unfortunately for the claimant the rule would apply here, but, beyond that, I think his own affidavit disproves it.

It is to be considered what is meant by giving notice of a charge to a trustee. This is certain:—that if a person met a trustee in society, and, in a casual conversation with him, stated that the *cestui que trust* had incumbered his interest in the trust property, this would be no notice which the trustee would be bound to recollect. There must be something bringing the incumbrance distinctly and clearly to the mind and attention of the trustee. It may be by parol (a), but that is dangerous. It must amount to this:—"mind and remember this, and if anyone inquires of you, inform him that the trust fund is incumbered." How could the Court deal with this case:—Suppose, after a mere casual conversation, a trustee told a subsequent incumbrancer that he did not recollect any prior charge? There was a case (b) in which a trustee stated that the fund was unincumbered, but which had really been incumbered ten years before, the trustee having notice of it. The trustee alleged, as an excuse, that he forgot the

(a) *Browne v. Savage*, 4 Drew. 470, and *Evans v. Bicknell*, 6 Ves. 182, 183.  
(b) *Burrowes v. Lock*, 10 Ves.

the circumstance, yet he was held responsible for the money. To constitute a valid notice, it must be such that if another person had come to the trustee and had asked him "Is there any incumbrance," and he had answered "No," and that person, on the faith of such answer, had advanced his money and lost it, this Court could have charged the trustee with the loss. The notice must be a formal notice, which the trustee is bound to remember. Here, not only does *Gruggen* deny any notice, but the evidence of *Rhodes* himself leads to the same conclusion. *Rhodes* says he never told the trustee the amount of his mortgage, which he was bound to do, and he also says that he did not think it was necessary to give *Gruggen* any formal notice of his mortgage. In my opinion, what he stated was in a casual conversation, and nothing like going to a trustee and saying, "take notice, that *A. B.* has incumbered the trust fund for 100*l.*, therefore take a note of that, in order that you may inform anyone who may inquire of you on the subject."

Considering the serious consequence of giving notice to a trustee, and the importance of its being strictly done, I am of opinion that, if done by parol, it must be in the most formal manner, and also that what was done here amounts to a mere casual conversation, and that it is not sufficient to bind the trustee.

Another question afterwards arose. The bankruptcy took place on the 16th of *January*, and on the 23rd of *January* the mortgagees first gave to the trustee distinct notice of his mortgage. The assignees were appointed in *February* following, and they afterwards gave the trustee notice of their claims.

Mr. *W. Pearson* now insisted, that, by virtue of the notice

1865.

Re  
TICHENNEL.

1865.  
  
*Re*  
 TICHENER.

notice after the bankruptcy, the mortgagee had priority over the assignees. He argued, first, that the trustee had no notice of the bankruptcy and of the assignee's title until after notice to the mortgagee had been given, and that the notice of the mortgagee being the first, he was entitled to priority. Secondly, that chattels in the order and disposition of a bankrupt did not vest in the assignees until the order for sale, for the assignees took only a power of selling them. That the Bankrupt merely said, that, when a bankrupt has in his possession goods of which he is the reputed owner, "the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy." That there was no right to sue until the order to sell has been obtained.

He cited 12 & 13 *Vict. c. 106, ss. 40, 125, 127 (a)*; 24 & 25 *Vict. c. 134*; *Re Atkinson (b)*; *Re Barr's Trust (c)*, and *Bartlett v. Bartlett (d)*, in which there was neither a notice nor stop order.

*The MASTER of the ROLLS.*

At present I am against Mr. *Pearson's* client; but if necessary, I will hear Mr. *Osler*.

*The MASTER of the ROLLS.*

Dec. 13. In this case I think the fund was in the order of disposition of the bankrupt, and, as the case stands, I think it belongs to the assignees.

(c) 1 *Chitt. Stat.* 292.

(b) 2 *De G., M. & G.* 140.

(c) 4 *Kny & J.* 219.

(d) 1 *De G. & J.* 127.

NOTE.—See *Re Webb's Policy, V.C. Malins, 8 March, 1867*

1866.

PETTINGER v. AMBLER.

Jan. 16.  
Feb. 13, 20.

**JOHN BUNN** made his will, dated the 3rd of *August*, 1858, by which he gave considerable legacies and made devises, specifically, of freehold and copyhold ; and he gave all other the real and personal estate, which he should, at his death, be seised or possessed of or entitled to, or over *which he had or should have any power to dispose*, unto trustees for sale, and to divide the produce between *Anne Pettinger* and others. And he revoked all wills and codicils theretofore made by him and declared that to be his *last will* and testament.

By a will, dated in 1858, the testator purported to execute all powers. By a subsequent settlement, he settled his property, reserving to himself a power of appointment by his "last will." He afterwards made another will, which he termed his "last will," and he thereby only partially executed the power:—  
Held, that the first will of 1858, though unrevoked, was, in no way, an execution of the power.

In *July*, 1861, and in *July*, 1862, he made codicils to his will, which did not affect the question.

On the 10th of *August*, 1862, *John Bunn* made a settlement of his property, which was to this effect: it was made and executed by and between the testator, of the one part, and the Defendant, *Caroline Wightman*, and the Plaintiff, *Anne Pettinger*, of the other part ; and the testator thereby conveyed certain property and all other his freehold estates unto *Caroline Wightman* and *Anne Pettinger* and their heirs, upon trust for himself for life, with remainder to *Elizabeth Jane Ambler* (otherwise *Elizabeth Jane Bunn*) for her life, and after her decease upon such trusts, &c. as *John Bunn*, by his *last will* or any codicil thereto, should appoint, and in default of appointment in trust for *Elizabeth Bunn*, her heirs and assigns. He also assigned to the same trustees all his leasehold personal estate upon trust for himself for life, with remainder to *Elizabeth Bunn* for life, with re-



1866.

PETTINGER  
v.  
AMBLER.

mainder as she should appoint, and in default upon trust for her.

This settlement, in fact, disposed of the whole of the property he then had, with the exception of copyholds.

In *November* following (1862) *John Bunn* made a will, commencing thus: "This is the last will of me *John Bunn*," &c., and he thereby, in pursuance of the power in the deed of settlement (which he referred to), gave a life annuity of 100*l.* to his sister *Anne Pettinger* out of his freehold property; but he made no further disposition of the property comprised in the settlement and subject to the power. He thereby demised his copyholds to *Caroline Wightman* and her heirs, and he appointed *Anne Pettinger* and *Caroline Wightman* executrixes.

The testator died on the 30th of *July*, 1863, and both wills and both codicils had been, in *November*, 1864, duly proved in the court of probate by the executrixes. The question was, whether the will of 1858 was, in any way, an execution of the power contained in the settlement of 1862. Another question arose on the following circumstances:—In *September*, 1861, the testator purchased a freehold property at *Croydon* for 850*l.*, but the contract had not been completed at his death, and a question was raised out of what fund the purchase-money was to be paid.

Mr. *Selwyn* and Mr. *Hardy* for *Anne Pettinger*, and Mr. *Baggallay*, Mr. *Renshaw*, Mr. *Luck*, Mr. *Rowcliffe* and Mr. *Bardswell* in the same interest. The will of 1858 operated as an execution of the power reserved by the settlement. The Wills Act, 1 *Vict.* c. 26, is precise; by sect. 24 a will is to speak as if executed immediately before

before the death of the testator; and by the 27th section a general devise includes all property which the testator has power to appoint, unless a contrary intention shall appear by such will. This will, therefore, is to be construed as if executed in *July*, 1863, and is to operate as an execution of all powers which the testator then possessed. Besides this, the will of 1858 is expressed to be made in execution of any power the testator "had or should have," and there is nothing in any of the instruments to shew a contrary intention. The will of 1862 did not operate as a revocation of the former wills, and the mere calling it "my last will" can have no such effect. The power was to be executed by the "last will," but, in truth, all the testamentary papers, taken together, formed the last will. If the testator had executed no will subsequent to the settlement, it is clear that the will of 1858 would have been an execution of the power. If so, it is only necessary to examine to what extent it is varied by the will of 1862; and the only variation, or the extent to which it is inconsistent with it, is, by the charge of the life annuity of 100*l*.

1866.

PATTINGTON  
v.  
ANSLAN.

They referred to *Miles v. Miles* (a); *Stellman v. Weedon* (b); *Thomas v. Jones* (c); *Williams on Executors* (d); *Ford v. De Pontes* (e); *Freeman v. Freeman* (f); *Cofield v. Pollard* (g).

Mr. *Jessel* and Mr. *Swanston* for *Elizabeth Bunn*. The will of 1858 was not an execution of the power contained in the subsequent settlement. That settlement operated as a complete revocation of all the prior testamentary dispositions of the property, and it created  
a new

(a) *Ante*, p. 191.(b) 16 *Sim.* 26.(c) 2 *John. & H.* 475, and 1 *De G., J. & Sm.* 63.(d) *Page* 144 (5th edit.)(e) 30 *Beav.* 572.(f) 5 *De G., M. & G.* 704.(g) 3 *Jur. (N. S.)* 1203.

1866.  
  
 PETTINGER  
 v.  
 AMBLER.

a new and limited power. The grant of probate is not conclusive either in regard to real estate or as to questions arising upon powers or on the construction of instruments. Here the testator has made a marked distinction as to the will which is to govern the disposition of the property in the settlement; it is to be emphatically the "last will," as it might be the last codicil, and the testator accordingly, by calling the will of 1862 his "last will," shews that he intended this alone to affect the property and that its operation should be confined to the bequest of the annuity. Though the statute says that the will is to speak at the death and to operate as an execution of all powers, still it means all valid testamentary instruments, and it merely shifts the *onus* of proof. Here there is a contrary intention, apparent from the words used and the disposition of the property, for it would be inconsistent to pass a mere reversion under the will of 1858, which directs an immediate sale and division. They cited *Barnes v. Vincent* (a); *Stoddart v. Grant* (b); *Farrar v. Earl of Winterton* (c); *Gale v. Gale* (d).

Mr. Joshua Williams for Caroline Wightman.

Mr. Selwyn in reply.

---

*The MASTER of the ROLLS.*

Feb. 13. The principal question in these suits is, whether the will of the testator, which bears date the 3rd August, 1858,

(a) 5 Moore, P. C. 201.  
 (b) 1 Macq. 163.

(c) 5 Beav. 1.  
 (d) 21 Beav. 349.

**1858**, is a due execution of the power contained in a ~~settlement~~ of 16th *August*, 1862, under the statute of **1 Vict. c. 26**, or whether a contrary intention appears **by the will**.

**1866.**

**PETTINGER  
v.  
AMBLER.**

Unless a contrary intention shall appear by the will, ~~the~~ effect of the settlement was to revoke the whole of ~~the~~ disposition contained in the first will, except as re- ~~ga~~ rds copyholds. The settlement, however, gives a ~~po~~ power to the testator to dispose of the freeholds after ~~the~~ death of Mrs. *Bunn*.

*I think I must look at the settlement and at the testa-  
mentary instrument together, to understand properly the  
effect of them. I find two wills, one in August, 1858,  
and another in November, 1862, and I find a settlement  
which says, that the freeholds shall go in a particular  
manner, unless they are otherwise appointed in and by  
my last will. If both these wills had professed to deal  
with the property and had appointed it by several and  
incon- sistent devises, it is clear that the will which was  
latest in date would have governed the disposition of  
this property. I think that the fact of making a second  
will after the date of the settlement and calling that  
his last will, is evidence that he did not intend his  
first will to operate as an execution of the power con-  
tained in the settlement. If a man leave several wills,  
all of which are intended to operate more or less upon  
his property, though each is called in the instrument  
itself "his last will," as indeed it was when it was  
executed, still each former will ceases to be the last  
will when another is executed, and this is so, though the  
former wills are still operative, though they are  
all proved, and though they all, legally speaking, speak  
from the death of the testator. A testator may ob-  
viously distinguish between his first, second and last  
will,*

1866.

**PETTINGER**  
**v.**  
**AMBLES.**

will, as he may between his first, second and last codicil, yet they all speak from the death of the testator, and the only question that arises in this case, is, in my opinion, whether he has made such a distinction here. Suppose this case :—That a testator settled property on *A.* for life, with remainder to *B.*, and afterwards, after reciting that he had made three wills respecting various portions of his property, the settlement directed that the property, the subject of the settlement, should, after the death of *B.*, go according to the directions contained in the first, or in the second, or in the last of his three wills, no one, I think, could doubt that this would operate as a settlement according to the directions contained in that one, in order of date, of the three wills which he so designated. Suppose again that the settlement, after reciting that he had made a will, and that he probably should make more wills, directed that the property settled should go according to the directions contained in the last of his wills, I think the same effect would be produced, and I also think that the same effect would be produced, if he directed how the property should go, if he did not otherwise direct, in the will, which should be the last of the wills he left.

These are, in my opinion, only different modes doing the same thing, viz., distinguishing between the wills he leaves, and the real question, I think, is, what is done here ?

One of these suits is a suit to carry into execution the trusts of the settlement, and I find that he directs that after the death of *Mrs. Bunn*, the property go as he shall appoint by his last will, and, in default of such appointment, he gives it to her absolutely. Some months afterwards he makes a will, which he calls his last will, it is, in fact, his last will, although it

another will of his called his last will, but prior in date, which is still unrevoked. By this, which is the last will in fact, so far as the date of execution is concerned, he makes no appointment of the freeholds. In this state of circumstances, I think that the former will cannot be brought in as operating so far as to be an execution of the power contained in the settlement of *August*, 1862. It is clear, that, to any person not versed in the technicalities of legal language, it would seem obvious, that when a man who has made one will and intends to make another, settles property so as to go in a particular manner, unless altered by his last will, he means the latest in date. He has two wills; he does not say "as appointed by my wills generally," but by "my last will." He might have made as many wills afterwards as he thought fit to vary, from time to time, the disposition of his property, merely intending that the last will should be that to govern the exercise of the power. It is true that a testator does not often make more wills than one, intending each to have operation, but he frequently does make many codicils. Would there have been any difficulty here if he had said "the last codicil" instead of "the last will," and so have reserved the power of altering the devolution of the property by the exercise of the power by the last codicil he made. If I adopted the other view, I should decide that the words "last will" are to be converted into "the will I have already made," or "any of the wills I may leave," the more so, as, in fact, the settlement is virtually a revocation of everything contained in the first will, with the exception of the disposition of the copyholds which he possessed.

It is also to be observed, that there might have been a very good reason, operating in the testator's mind, for allowing the will of 1858 to stand, and for not, by his will of 1862, revoking the will of *August*, 1858,  
because

1866.  
POTTINGER  
v.  
AMBLER.

1866.  
PETTINGER  
v.  
AMBLER.

because if the testator had acquired any freehold property after the date of the settlement, it would have passed by the first will and not by the settlement.

I am therefore of opinion that the will of *August*, 1868, did not operate as an execution of the power contained in the settlement of *August*, 1862.

With respect to the contract for the property at *Croydon*, as this contract was entered into previously to the execution of the settlement of *August*, 1862, it is subject to the trusts of that settlement, as freehold estate purchased by the settlor, who was the owner thereof, in equity, subject to the payment of the purchase-money.

If the testator had not made a will subsequent to the settlement, I should have held that the first will was an execution of the power, but as it is I declare the will of 1868 and the two codicils were not a due execution of the power contained in the settlement of 1862, and that Mrs. *Bunn* is entitled to the freeholds and leaseholds comprised in the settlement.

---

Feb. 20      *The MASTER of the ROLLS* referred to a case of *Harwood v. Goodright* (a).

(a) *Comp.* 87.

---

1866.

PROCTOR v. ROBINSON.

Jan. 23.  
Feb. 14.

**T**HE facts of this case are fully stated in the judgment of the Court.

Deed between husband and wife improperly obtained from the husband, through the wife's solicitor, who took a benefit under it, set aside, with costs, to be paid by such solicitor.

Mr. Selwyn and Mr. Kay, for the Plaintiff, argued, that the provision as to future separation was contrary to the policy of the law, and invalidated the whole deed, for being voluntary, it could not be altered or reformed. Secondly, that the deed had been improperly obtained by Mr. Robinson and ought to be set aside.

Deed by which a husband makes a provision for his wife in case of a future separation is radically defective.

They referred to *H— v. W—* (a); *Egerton v. Lord Brownlow* (b); *Cartwright v. Cartwright* (c); *Vestmeath v. Westmeath* (d); *Hope v. Hope* (e); *Vansittart v. Vansittart* (f); *Hinley v. Westmeath* (g); *Simpson v. Lord Howden* (h); *Durant v. Tittley* (i); *Cocksedge v. Cocksedge* (k).

A delay of nine years in seeking to set aside a deed, held, under the circumstances, accounted for.

Mr. Southgate and Mr. Villiers, for the Defendant, cited *Frampton v. Frampton* (l).

Mr. Selwyn in reply.

*The MASTER of the ROLLS.*

**P** This is a suit to set aside a deed executed by the Plaintiff, on the ground of inadequate consideration, surprise

Feb. 14.

(a) 3 Kay & J. 382.

(b) 1 H. of L. Cas. 4.

(c) 3 De G., M. & G. 982.

(d) Jacob, 126, and 1 Dow. & 519.

(e) 8 De G., M. & G. 731.

(f) 2 De G. & J. 249.

(g) 6 Barn. & Cres. 200.

(h) 3 Myl. & Cr. 97.

(i) 7 Price, 577.

(k) 14 Sim. 244.

(l) 4 Beav. 287.



# CASES IN CHANCERY.

1866.

PROCTOR  
v.  
ROBINSON.

surprise and want of proper legal assistance on the part of the settlor, and also as being in contemplation of the future separation of husband and wife.

The Plaintiff was possessed of a small property of the value of about 180*l. per annum*, when, in the month of *November*, 1846, he intermarried with his present wife, who was also possessed of a small separate property. The marriage was not a happy one, and they soon separated and lived apart for some time. But, in *March*, 1854, steps were taken by the wife for a renewal of intercourse; some meetings and correspondence took place between their respective solicitors, and in *June*, 1854, the Defendant, Mrs. *Proctor*, issued a citation against the Plaintiff for the restitution of conjugal rights. The Defendant, Mr. *Robinson*, was her solicitor in this transaction, and Mr. *Sharp* was the solicitor of the Plaintiff. In *July*, 1854, the Plaintiff and his wife returned to live together in the house of the wife at a place called *Austwick*, but they had not entirely settled their differences, and, apparently desirous that this should be done, on the 15th *July*, 1854, the husband and wife went together to Mr. *Sharp*, and requested him to draw up an agreement which should regulate the terms on which they were in future to live together. This he declined to do in the absence of Mr. *Robinson*, the solicitor for Mrs. *Proctor*.

On the 8th *August*, 1854, Mrs. *Proctor* wrote to Mr. *Robinson*, requesting him to come over to their house to make some arrangement. Accordingly, Mr. *Robinson* went over to *Austwick* and prepared an agreement, which Mr. *Proctor* signed. No persons were present, except the Plaintiff, his wife and Mr. *Robinson*. The agreement

agreement was made between Mr. and Mrs. *Proctor*, and was in these terms :—

1866.  
PROCTOR  
v.  
ROBINSON.

1st. That an action which had been brought by *Robinson* for goods supplied to the wife should be stayed. 2nd. That the rents of Mrs. *Proctor's* property should be received by herself to her separate use till a certain period. 3rd. That the subsequent rents should be received by Mr. *Proctor*. 4th. Mr. *Proctor* to settle an annuity of 60*l.* upon Mrs. *Proctor* payable during her life, to commence on death of Mr. *Proctor*. If it should unfortunately happen that Mrs. *Proctor* should determine again to live separate and apart from Mr. *Proctor*, then she was to have an annuity of 40*l.* during her life, but if Mr. *Proctor* should die before Mrs. *Proctor* the said annuity of 60*l.* was to be paid to her in lieu of the annuity of 40*l.* from his death. 5th. That Mr. *Proctor* should pay Mr. *Robinson* the costs of business transacted by him for and on the instructions of Mrs. *Proctor*, the amount to be ascertained as soon as might be and to be paid by annual instalments of 40*l.*, and interest in the meantime at 4*l.* per cent. 6th. That Mr. *Proctor* should pay his wife's debts and liabilities as soon as he could. 7th. That Mr. *Proctor* should settle the furniture in their house on his wife, and that proper deeds and assurances to carry into effect the agreement should be forthwith prepared and executed. 8th. If Mr. and Mrs. *Proctor* should unfortunately again separate before Mr. *Proctor* received rents belonging to Mrs. *Proctor* sufficient to reimburse the payments made in the sixth item of the agreement, he was to receive the rents until he should be repaid the balance, but the annuity was to become payable.

Certainly a more one-sided agreement, even if legal, could scarcely be produced. It is difficult to see what benefit the Plaintiff could get from it; he agreed to pay  
Mr.

1866.  
  
 PROCTOR  
 v.  
 ROBINSON.

Mr. *Robinson's* professional charges for his employment by Mrs. *Proctor*, for which he, the Plaintiff, was not liable; he agreed to pay her debts generally, whether incurred for necessities supplied to her or not; he agreed to settle his furniture on her for her separate use, and agreed to give her an annuity of 40*l. per annum* if they should ever live separate again; in other words, if she should think fit to leave him. At this time, as it is shewn by the letters 21 and 22, the Plaintiff owed little or nothing to Mr. *Robinson*, and no claim was made against him for costs incurred for Mrs. *Proctor*. The Plaintiff was also wholly ignorant of the nature and amount of costs incurred by his wife. The Plaintiff had no professional advice; Mr. *Robinson* knew that Mr. *Sharp* was the Plaintiff's solicitor, and did not communicate with him, unfortunately not following therein the course adopted by Mr. *Sharp* towards Mr. *Robinson*.

It is obvious that if the matter had rested there, this was an agreement, the performance of which could never have been enforced in any Court of Equity.

Mr. *Robinson* returned home the same day and sent a copy of the agreement to the Plaintiff, and also wrote to Mr. *Sharp* to inform him of the fact, but he sent him no copy of the agreement. To this, Mr. *Sharp* sent an answer, complaining of Mr. *Robinson* so acting in his absence, and referring to his own opposite course of proceeding, and to which Mr. *Robinson* sent a reply, stating and excusing his intention of persisting in his course. With the exception of these letters, I cannot find that anything occurred between this 8th of August 1854, and the 16th May, 1855.

On the 16th of May, 1855, and, as it seems, without any previous warning, notice or appointment, the Defendant,

Defendant, Mr. *Robinson*, and his clerk Mr. *Green*, called on the Plaintiff and his wife, who were still inhabiting the same house together at *Austwick*. When they arrived there, they found Mr. *Robert Brown*, who had married a neice of Mrs. *Proctor*, present as a guest. Mr. *Brown* did not leave till past ten at night; during his presence nothing was said, but, on his departure, the deed impeached was produced, ready engrossed. No copy of it had been sent beforehand to the Plaintiff or his wife, no written instructions had been given to Mr. *Robinson*, and if any had been prepared by Mr. *Robinson*, they were never seen by the Plaintiff or his wife, and are not now produced. Even the agreement of *August* previous was not produced and compared with the deed. The deed itself, which is a long one, was discussed for about two hours, and was then duly executed by the parties to it at about half an hour after midnight. After the execution of it, the company, consisting of the Plaintiff and his wife, and the solicitor and his clerk, continued to discourse for about three hours, and left between three and four o'clock, early in the morning of the 17th of *May*, 1855.

1866.  
  
 PROCTOR  
 v.  
 ROBINSON.

The deed does not entirely follow the agreement; some additions were made, one of which, though much relied upon by the Plaintiff's counsel, has made but little impression upon me; it is, that the furniture, which is settled for the separate use of Mrs. *Proctor*, with power to her to appoint it by will, is given, in default of appointment, to the daughters of Mr. *Robinson*. Judging from the schedule to the deed, the furniture does not appear to be much, and the prospect of obtaining it is remote, as it depends on the contingency of Mrs. *Proctor* not otherwise disposing of it.

The deed itself, however, is radically defective in  
 various

1866.

PROCTOR  
v.  
ROBINSON.

various other respects. In the first place, it is made, as I observed of the agreement, in contemplation of the future separation of Mr. and Mrs. *Proctor*, and the effect of this clause is, to give her 40*l. per annum*, by way of premium, if she chose to leave her husband. It is, as it appears to me and as I observed of the agreement, without sufficient consideration as regards the husband. The suits in the Divorce Court had, in fact, been terminated, except as to costs, by the cohabitation of Mr. and Mrs. *Proctor* beginning in *July*, 1854, and continued since that time—a period of ten months. By this deed, Mr. *Proctor* agrees to pay 417*l.* costs of Mrs. *Proctor*, for which he was not liable, the propriety of which claim, even as against Mrs. *Proctor*, he was wholly incapable of judging of, and respecting which he could consult no one, for the bill of costs and cash account were then produced to the Plaintiff for the first time and were not left with him; he had never seen a copy of the deed before; he had no independent advice, and he executed the deed on an unexpected application at midnight, after dinner and subsequent libations; not that I mean to insinuate, by that observation, that there is the least evidence that Mr. *Proctor* was in the slightest degree intoxicated. But how is it possible that a deed can stand, executed at such a time and accompanied by such circumstances? The husband alone is the party who gains nothing and gives up all, his wife gets her debts paid, she gets an annuity of 60*l. per annum* after the husband's death, and 40*l. per annum* during his life if she thinks fit to cast him off, and she gets the settlement of her property to her separate use. Her solicitor gets the payment of his costs secured on ample security, without taxation and without examination, he gets the wife to use her influence to obtain the execution of the deed from her husband (for such I think is the fair inference to be drawn from the evidence), on the assumption  
that

that she will be provided for for life, whether she leaves her husband or not, and yet he never tells her that such a stipulation is wholly void and cannot be enforced, and all this, I repeat, done at midnight, without either the one or the other having had any independent advice.

1866.  
PROCTOR  
v.  
ROBINSON.

If this provision about future separation had been the only thing contained in the deed, the rule of Lord *Cottenham* in *Simpson v. Lord Howden* (a) might have been applied, but this deed is open to the many other objections which I have stated, and which this Court cannot but disapprove of. The more it is examined the more faulty it appears.

Unless the Plaintiff is barred by acquiescence the decree appears to me to be of course. The transaction, however, took place in *May*, 1855, and this bill is not filed till 24th *June*, 1864, upwards of nine years after the transaction took place. The Plaintiff alleges that he never discovered what the real contents of the documents were until the middle of the year 1863, when *Mr. Robinson*, under the powers contained in the deed, having contracted to sell a property called *Bents* (a part of the estate comprised in the deed in question of *May*, 1853), the purchaser required the concurrence of the Plaintiff in the conveyance, who referred the matter to his solicitor, who thereupon discovered the whole affair and duly explained it to the Plaintiff and his wife.

I have examined the evidence carefully, to see if I could discover anything to discredit this statement. The only thing I have observed is, that *Mr. Robinson* received the rents of the property which had originally belonged to *Mrs. Proctor* and which was included in the indenture  
of

(a) 3 *Myl. & Cr.* 97.

1866.  
 ~~~~~  
 PROCTOR
 v.
 ROBINSON.

of *May*, 1855, and had made payments thereout to them, which struck me at first as acquiescence on the part of the Plaintiff. But, on further examining the matter, I am of opinion that this is not any evidence of knowledge on the part of the Plaintiff of the contents of the deed, for the receipt of rents by Mr. *Robinson* was not in accordance with the provisions of the deed, and must, therefore, have depended on some arrangement distinct from it, and cannot therefore be treated as an acquiescence to the deed.

It is next to be observed, that no copy of the deed was ever sent to the Plaintiff, nor do I find that any accounts were sent or communications made to him, which were inexplicable, except by reference to the deed, or that the provisions of the deed were ever referred to for the purpose of explaining such accounts or such communications. It is true, that shortly before the bill was filed, and since the Plaintiff was made acquainted with the matter by his solicitors in 1863, Mr. *Robinson* has sent in an account to the Plaintiff, containing an account of his receipts and payments and of his professional costs. This, beginning with the 417*l.* mentioned in the deed, and adding to it the costs of the transaction itself, together with interest and the subsequent accounts down to the time of the delivery of the accounts, amount in the whole to the sum of 1,059*l.* 19*s.* But this is the first direct notice to the Plaintiff, proceeding on the footing of the indenture, which I have been able to find in the evidence which would disclose to the Plaintiff the real nature of the transaction he had entered into in *May*, 1855.

I think, notwithstanding the elaborate statement of Mr. *Robinson* and his clerk, that the deed was explained to the Plaintiff clause by clause, beginning at half past

past ten o'clock at night and continuing during the two
succeeding hours, during which time, however, it is
proved, that though Mr. *Robinson* and his clerk drank
nothing, the opposite was the case with the Plaintiff and
his wife.

1866.
 ~~~~~  
 PROCTOR  
 v.  
 ROBINSON.

Notwithstanding this evidence, I have been un-  
**a**ble to come to the conclusion that the Plaintiff did  
**u**nderstand this explanation, and I have come to the  
**c**onclusion that it was not till the middle of 1863 that he  
**d**id really know what he had been asked to do, and what  
**h**e had done in *May*, 1855. Having come to this con-  
**c**clusion, I am of opinion that no *laches* can tell against  
**t**he Plaintiff in this case, and that the deed and pre-  
**l**iminary agreement must both be delivered up to be  
**c**ancelled. Such being my opinion, it follows, as a  
**m**atter of course, that Mr. *Robinson* must pay the costs  
**o**f this suit. Mr. *Ellis* I understood did not appear and  
**h**ad not acted in the trusts, and has not therefore incurred  
**a**ny costs; if this be erroneous, the Plaintiff must pay  
**h**is costs and add them to his own, and recover both  
**a**gainst Mr. *Robinson*. The other Defendants can have  
**n**o costs. They are Mrs. *Proctor* and the two daughters  
**o**f Mr. *Robinson*, they will neither have to pay nor re-  
**c**eive costs.

---

**N**OTE.—Affirmed, in substance, by the Lords Justices (15 L. T.  
 431).



1866.

Feb. 23, 26.

The words  
"survivors  
and survivor"  
of parents  
construed  
strictly,  
although the  
children of  
some of them  
took an inter-  
est in re-  
mainder.

*Re USTICKE.*

THE testator, by his will (1844), bequeathed his personal estate in trust for all the children of his niece, *Georgiana Beauchant*, who should attain twenty-one, equally.

By a codicil (1848), the testator, in reference to the above bequest, directed that the share of each daughter of his niece should be paid to her for her separate use without power of anticipation, and that after the decease of each such daughter, the securities, the dividends and interest whereof were so payable during her lifetime to such daughter, should go to and be divided equally between her children and the issue of her children, to be vested and payable at the times and in manner therein mentioned; and if there should be no such child of such party so dying, then that the trustees should stand possessed of the said trust monies and securities in trust for the survivors or survivor of all the children of his niece, and the same should go to and be enjoyed by them, and their, his and her children, subject to the same trusts and the same restrictions in all things, so far as the same were applicable thereto, as were therebefore declared of the original share of each of the daughters of his said niece. There was no gift over if they all died without issue.

The testator died in 1851. His niece had seven children, all of whom attained twenty-one.

*Theophilus*, one of the niece's children, died in July,

1864

1864, leaving children, and *Ann*, another of such children, died in *December*, 1864.

1866.

Re  
USTICKER.

The one-seventh share of *Ann* had been paid into Court by the trustees, and a petition was now presented to have the rights of the parties to it declared, and to have the fund transferred.

Mr. *Baggallay* and Mr. *C. Hall*, for some of the children of the niece, argued, that the children of *Theophilus* took no interest in *Ann's* share, inasmuch as *Theophilus* did not survive *Ann*.

Mr. *Selwyn* and Mr. *Rowcliffe*, for the children of *Theophilus*, argued that the words "survivors or survivor" were to be construed "others or other;" that it was impossible to suppose that the interest in remainder of the children of *Theophilus* who survived *Ann* could depend on the father surviving her.

Mr. *E. Romilly* for the trustees.

The following authorities were referred to:—*Re Keep's Will* (a); *Re Corbett's Trusts* (b); *Eyre v. Marsden* (c); *Jarman on Wills* (d).

*The MASTER of the ROLLS.*

My opinion is, that the words "survivors or survivor" must be read as they stand, and that it would be impossible to hold otherwise, unless I made a new will for the testator. None of the other clauses require the words "survivors or survivor" to be read "others or other," and

(a) 32 *Beav.* 122.  
(b) *Johns.* 591.

(c) 4 *Myl. & Cr.* 231.  
(d) *Vol.* 2, p. 751 (3rd edit.)

1866.

*Re*  
USTICKE.

and it is admitted that there is no gift over. I think that the tendency of all modern authorities is, to hold that the word "survivor" must have its ordinary plain meaning.

I will look at the cases; but those in which there is a gift over, if the whole class die without issue, are quite distinct, for there would be an intestacy, unless the words were construed "others or other."

---

*The MASTER of the ROLLS.*

Feb. 23. I have looked at the cases, and I am clearly of opinion that the words "survivors or survivor," in this will, must be construed literally, and that I cannot change them into "others or other." They mean surviving in the proper sense of the term.

---

BRETT v. CARMICHAEL.

Mar. 10.

After a decree in an administration suit for payment of the debts and of the remaining assets to the parties entitled, persons in *France*, claiming as creditors, and who had not come in under the decree, took proceedings there against the executors: on the petition of the executors the order for payment to the beneficiaries was stayed.

UNDER the decree, made in 1864 in an administration suit, the usual accounts had been taken and the creditors who had come in had been found by the certificate of the Chief Clerk. These debts had been paid, and, by an order made in *July*, 1865, a compromise between the parties was confirmed, and the distribution of the funds had been directed.

After this, certain alleged creditors of the testator, resident in *France*, had commenced proceedings there against

the executors: on the petition of the executors the order for payment to the beneficiaries was stayed.

against the executors in respect of their alleged claims. The testator's assets were all in *England* and still remained undistributed, and there was no personal representative of the testator in *France*.

1866.

BRETT  
v.  
CARMICHAEL.

Under these circumstances, the executors presented a petition to stay the distribution of the assets until the determination of the proceedings in *France*, and for proper inquiries and directions.

Mr. *Hemming*, in support of the petition, argued, that both the rights of the creditors in *France* and of the executors here ought to be protected.

Mr. *Baggallay* and Mr. *Holmes* for the Plaintiff, and Mr. *Kay*, Mr. *Osborne*, Mr. *Morgan* and Mr. *Macnaghten* for other parties, resisted the application. They argued that the decree of this Court ought not to be stayed by parties in *France*, who had neglected to come in, especially as their claim was of a very doubtful description, and that it would be unjust to keep the parties out of their money until the legal proceedings in *France* had terminated.

*The MASTER of the ROLLS.*

It is constantly the practice to allow creditors to come in before the final distribution of the assets (a).

What I shall do is this:—I shall stay, for the present, the order for distribution. The claimants abroad (the executors know who they are) must be informed, that, unless they come in on or before the first day of next term, I shall distribute the fund as it stands. Advertisements of that fact must be inserted in the *Moniteur*, and the rest of the petition must stand over.

---

(a) *Lashley v. Hogg*, 11 Ves. 602; *Gillespie v. Alexander*, 3 Russ. 130.

1866.



## BEDFORD v. BEDFORD.

Mar. 24.

A sole Plaintiff having died after decree, an order to revive against his devisee was made, under the 15 & 16 Vict. c. 86, s. 52.

THIS was a suit for the administration of the real and personal estate of a testator.

After the decree had been made the sole Plaintiff died.

Mr. *C. Browne* now asked for an order to revive under the 15 & 16 Vict. c. 86, s. 52. He referred to *Dendy v. Dendy* (a); *Williams v. Williams* (b); *Jackson v. Ward* (c); and *Laurie v. Crush* (d): see also *Eyre v. Brett* (e); and *Earl Durham v. Legard* (f); and observed, that a decree having been made, the order now asked would not, as it would before decree, be open to the objection, that it would be obtaining a supplemental decree before a decree had been made in the original cause.

*The MASTER of the ROLLS.*

I think that does make a distinction. Take the order.

- (a) 5 *W. Rep.* 221.
- (b) 9 *W. Rep.* 296.
- (c) 1 *Giff.* 30.

- (d) 32 *Beav.* 117.
- (e) 34 *Beav.* 441.
- (f) *Ibid.* 442.

---

1866.

## HALE v. BUSHILL.

March 2.

**I**N 1859, the testator, Mr. *Mallulue*, granted to the Plaintiff, *Hale*, a lease of a farm for seven years, with the option of purchasing it within that period. The testator had, in the previous year (1858), devised the farm to the infant Defendant.

A testator had granted to the Plaintiff the right of pre-emption of an estate which he had previously devised to an infant. The Plaintiff exercised his option after the testator's death and filed his bill against the infant and executor for specific performance. The Court gave no costs against the Defendants.

The testator died in 1861, and in 1864 the Plaintiff exercised his option of purchasing the farm; but, it being vested in an infant, he was compelled to institute this suit to obtain a specific performance and conveyance.

Mr. *H. Humphreys*, for the Plaintiff, argued that the testator's estate was liable to pay the costs of this suit which had been occasioned by his act. He cited *Purser v. Darby* (a); *The Eastern Counties Railway Company v. Tuffnell* (b); *The Midland Railway Company v. Westcomb* (c); *In re Weeding's Estate* (d).

Mr. *Baggallay* for the infant. This was not an absolute contract for sale, but a mere option to become purchaser. There was no contract to purchase until after the testator's death, when the option was exercised, and the difficulty is accidental and attributable to no one. There should be no costs given on either side. He relied on *Bannerman v. Clarke* (e).

Mr.

(a) 4 *Kay & J.* 1.(b) 3 *Railw. Ca.* 133.(c) 11 *Sim.* 57.(d) 4 *Jur. (N. S.)* 707.(e) 3 *Drew.* 632.

1866.

HALE

v.  
BUSHILL.

Mr. *Dickinson*, for the executor, contended that no costs were payable, there being no real default.

Mr. *Humphreys* in reply.

*The MASTER of the ROLLS.*

When I find conflicting decisions, I must necessarily follow the one which appears to me to be that most consonant with reason and equity. I shall follow *Bannerman v. Clark*, which appears to be more reasonable and which was not cited before the Vice-Chancellor when he decided *Purser v. Darby*.

If, after a contract for the sale of an estate, the vendor intentionally did some act to embarrass the title, this Court would make him or his estate pay the costs of it. But the fact of the death of the vendor or his not having made his will or of his not having disposed of the property, would not appear to me to be such a case.

I express no opinion of how the case would stand, immediately after a contract for sale, a testator made a will and devised the legal estate to an infant. But the difficulty here arose from the act of God, and the will was made prior to the contract, which merely gave an option and which the Plaintiff never exercised in the testator's lifetime.

I am of opinion that no costs ought to be given in this case.

1866.

*Ex parte* THE TRUSTEES OF THE BIRMINGHAM BLUE-COAT SCHOOL.

BY a private act of parliament, 8 & 9 *Vict.* c. xxvii. confirming a scheme for the management of the charity, the trustees were empowered to sell all trees, stone, coal, ironstone, brickearth, clay, loose sand and gravel. The produce was to be paid into Court, and applied in the purchase of freeholds near *Birmingham*. By the 15th section, the money, until applied, was "from time to time to be laid out, under the direction of the Court, in the purchase of *navy, victualling or exchequer bills*."

March 10, 12.

By an act of parliament, funds in Court were, by way of *interim* investment, to be laid out in "Navy, Victualling or Exchequer Bills." But, under the 23 & 24 *Vict.* c. 38, and the General Orders of the 1st of February, 1861, the Court allowed them to be invested in Consols.

A sum of 2,895*l.*, arising from the sale of clay, sand and gravel, had been paid into Court, and the trustees, by this petition, asked that it might be invested in *Consols*.

Mr. *Speed*, in support of the petition, referred to the 23 & 24 *Vict.* c. 38, and to the General Orders of the 1st of February, 1861 (*a*), and he argued, that, notwithstanding the terms of the special act, the fund, being "cash under the control of the Court," might be invested in Consols.

He also referred to *Morgan's Pr.* (*b*).

The MASTER of the ROLLS doubted whether such an order could be properly made.

Mr.

(*a*) 30 *Beav.* 651.(*b*) *Pages* 301, 684.



1865.  
March 12.

*Ex parte*  
THE TRUSTEES  
OF THE  
BIRMINGHAM  
BLUE COAT  
SCHOOL.

Mr. *Speed* produced an order in *Re Mitford's Estate*, in which Vice-Chancellor *Wood* had authorized a fund, directed to be laid out in exchequer bills, to be invested in Consols.

The MASTER of the ROLLS.

I will follow that authority.

### Re THE HUMBER IRON WORKS COMPANY.

March 12, 13.

Rules as to costs upon petitions to wind up public companies.

When the Court makes no order on a petition to wind up, the shareholders supporting it get no costs, and the shareholders resisting it get no costs unless personally assailed. But when the Court makes the winding-up order, the shareholders or creditors supporting it get one set of costs between them.

ON the 20th of *February*, 1866, the shareholders of this company confirmed a resolution for winding it up voluntarily, and for appointing Mr. *Child*, the liquidator, at a considerable salary.

On the 27th of *February*, 1866, Messrs. *Lathan* and *Smith*, creditors of the company, presented a petition, through the company's solicitors, for winding it up under the supervision of the Court, and for continuing Mr. *Child* as the liquidator.

Upon this, Mr. *Witham*, a large judgment creditor of the company, presented a second petition for winding it up compulsorily. He suggested that the first petition had been presented in collusion with the company, in order to continue the voluntary winding up and to retain Mr. *Child* in the management, contrary to the interests of the creditors. This second petition could not be heard until the 17th of *March*.

Mr. *Selwyn* and Mr. *Marten* now (12th *March*) appeared on behalf of Messrs. *Lathan* and *Smith*, and obtained an order for winding up the company.

Mr. *Roxburgh*, for Mr. *Witham*, said that, in that case, it would be unnecessary to bring on his petition on the 17th of *March*. He asked to withdraw it, and for his costs. He cited *In re Marlborough Club Company (a)*.

1866.

Re  
THE HUMBER  
IRON WORKS  
COMPANY.

Mr. *Baggallay* and Mr. *Druce* for the company.

Mr. *Jessel*, Mr. *Southgate*, Mr. *Bagshawe* and Mr. *F. Harrison* appeared for other large creditors to insist on a compulsory winding up. They asked for their costs.

---

*The MASTER of the ROLLS.*

I have considered the question of costs in this case, and I shall presently state the rule which I have adopted and expressed, and which I intend to follow. But the case of Mr. *Witham* is an exception, and does not come within the ordinary rule; for I think that he is entitled to the costs of his petition, presented by him under peculiar circumstances. The other petition was really the petition of the company, asking the continuance of this Official Liquidator. Mr. *Witham* was, therefore, justified in presenting his petition, which was a proper one for the purpose, and I shall allow him his costs out of the estate.

*March* 13.

With respect to the other creditors, two cases are to be considered in determining the proper rule; one where the Court refuses to make any order, and the other where it makes the order to wind up the company. The rules as to costs are separate and distinct in these two cases.

I will

(a) 1 L. R. (Eq.) 216.

1866.

Re  
THE HUMBER  
IRON WORKS  
COMPANY.

I will take the first case, where the Court refuses to make the order. In that case, I shall adopt the rule which I stated yesterday in the Anglo-Greek case (a), namely, that where the Court refuses to make the order, the company opposing the order will have their costs from the Petitioner. But contributories, shareholders or creditors, who appear and support the petition, cannot have their costs, for as they come to support the Petitioner they cannot have their costs from him. As to those who appear to oppose the petition, I shall give them no costs, except where a personal charge is made against them of such a character as to justify them in appearing and opposing the petition. If they be free from blame, and if the charges against them are disproved, I shall give them their costs, to be paid by the Petitioner.

In the other case, where the Court grants the prayer of the petition, it gives no costs to those who appear to oppose it, for the Court makes the order against them. The Court, however, gives costs to the company out of the estate. Where shareholders or creditors appear for and support the petition which asks that the company may be wound up, and the Court makes the order, it allows them one set of costs.

I have written down the rule thus :—

“Where the Court refuses to make any order, the shareholders supporting the petition get no costs, and the shareholders resisting the petition get no costs from the Petitioner, unless personally assailed. Where the Court makes the order to wind up, and shareholders or creditors appear, together or separately, to support one set of costs is given amongst them out of the estate.”

In

(a) *Post.*

In this case there are four creditors who appear, and they must arrange how the one set of costs is to be distributed amongst them.

1866.

Re  
THE HUMBER  
IRON WORKS  
COMPANY.

Re THE CONSTANTINOPLE AND ALEX-  
ANDRA HOTEL COMPANY.

March 12.

**A**N order had been made to wind up this company, and Messrs. *Smith* and *Eldborough* claimed to be creditors of the company for 8,000*l.* The official liquidator took out a summons calling on Messrs. *Smith* and *Eldborough* to make the usual affidavit of documents in their possession and to produce them. The Chief Clerk proposed making the usual order, but the claimants disputed his jurisdiction and asked for an adjournment into Court, which was granted.

Under a winding-up of a company, a party claiming as a creditor must either submit to produce all documents in his possession relating to his claim, or it will be disallowed.

**Mr. Bevir** in support of the application. The practice under the Winding-up Act is similar to that in a creditors' suit. It is the ordinary course in creditors' suits to make the claimant produce all documents relating to his claim. He referred to the 15 & 16 *Vict. c. 86, s. 18.*

**Mr. Locock Webb** for the claimants. This is the first application of this sort, and the statute referred to only applies to suits. The case of a creditor is very different, for creditors are, after decree, as it were, parties to the suit.

*The MASTER of the ROLLS.*

In creditors' suits it is my practice, if a claimant does not bring forward his papers, to disallow his debt, and I follow the same course when winding up companies.

I cannot

1866.

*Re*  
THE CONSTAN-  
TINOPLE AND  
ALEXANDRA  
HOTEL  
COMPANY.

I cannot make the order on these claimants compulsorily, but I must disallow their claim unless they bring in all the documents. No one can properly prove his debt without producing all the documents relating to it. The Respondents must pay the costs.

NOTE.—See 25 & 26 Vict. c. 89, s. 115, 117.

1865.

March 24.

Distinction between a decree to administer the estate of *A. B.* and a decree directing his legal personal representative either to admit assets or to account.

When, after a decree directing a legal personal representative to admit assets or account, he pays debts, he will be allowed them, though the estate should prove deficient. But when such a payment is made after a decree for the administration of the estate the rule is otherwise.

GEORGE v. GEORGE. (No. 1.)

A TESTATOR, *W. W.*, died in 1841, and *Greaves* and *Wright* were his executors and trustees. *Greaves* died intestate in 1859 and *Bagshawe* was his representative. In 1861, the usual decree was made for the administration of the estate of *W. W.* the testator. The decree also “ordered that what should be coming from *Greaves* should be answered by the Defendant *Bagshawe*, his administrator, out of his estate come to his hands in a due course of administration. And in case *Bagshawe* should not admit assets of *Greaves* sufficient for the purpose aforesaid, then it was ordered that an account should be taken of the personal estate of *Greaves* received by *Bagshawe*, or by any other person or persons by his order or for his use.”

In taking the accounts, a sum of 1,201*l.* 3*s.* 5*d.* was found due from *Greaves*’ estate to the estate of the testator *W. W.*, and *Bagshawe* declined to admit assets to pay it. An account was thereupon taken of *Greaves*’ estate.

The Chief Clerk found that *Bagshawe* had received assets of *Greaves* to the amount of 16,616*l.*, and that he

he had paid or was entitled to be allowed 22,052*l.*, leaving a balance of 5,436*l.* due to him. But it appeared that *Bagshawe* had, since the decree of 1861, paid debts of *Greaves* to the extent of 6,670*l.* There was still some outstanding estate of *Greaves*, which had not been ascertained under the decree.

1865.  
GEORGE  
V.  
GEORGE.  
(No. 1.)

The Plaintiff contended, this sum of 6,670*l.* ought to be disallowed, on the ground that it had been paid after the decree, to the exclusion of the debt due from *Greaves* to the estate of the testator. The Chief Clerk reserved the question for the future decision of the Court. The case now came on for further consideration.

Mr. Selwyn and Mr. Woodhouse for the Plaintiff.

Mr. Eddis, Mr. Elderton, Mr. Cole and Mr. Bagshawe for the other parties.

The MASTER of the ROLLS.

The Defendant *Bagshawe* has, since the decree was made in this cause, paid simple contract debts for which the personal estate of his intestate was liable, and I am of opinion that these payments must be allowed.

I must point out a distinction between what I call a decree for the direct administration and a decree for the collateral administration of an estate. It is true that, in a suit for the administration of an estate, if payments are made by the executor or administrator after a decree has been made for the administration of an estate, that is, if the executor or administrator, knowing that there is a deficiency of assets, thinks fit to pay a simple contract debt in full, all that he can do is, to stand in the place of the creditor whom he pays, and he must bear the loss if

1865.

GEORGE

v.

GEORGE.  
(No. 1.)

if the estate should prove insufficient to pay all the debts (a).

Here a debt is due to the estate of a testator from his executor *Greaves* who is dead, and the administrator of *Greaves* is called on to admit assets or to account for the personal estate of *Greaves* received by him. This is not a simple decree for the administration of the estate of *Greaves*; it is a decree for the administration of the estate of *W. W.* Under it, the representative of a deceased debtor to the estate of *W. W.* is required to make good the debt; if assets are not admitted by him, you must take the account against him, and if a balance is found in his hands, you are entitled to be paid out of it what is due to the estate administered under the decree: but this is all; if you seek any other relief it can only be had by means of a suit for the administration of the estate of the deceased executor. If it were otherwise, you might have a cluster of administrations of different estates in one suit.

Where a Defendant, being a legal personal representative, is directed either to admit assets or to account for the estate which he holds in trust, it is a sort of collateral order, made for the purpose of ascertaining whether a personal order can be made against him for payment of the debt due from the estate he represents. If he does not admit assets, an account is taken and the debt is paid out of the assets in his hands.

If you want to go further, you must take such proceedings as you may be advised against *Bagshawe* to administer the estate of *Greaves*.

(a) *Jones v. Jukes*, 2 Ves. jun. 518; *Shewen v. Vanderhorst*, 1 R. & Myl. 347; 2 R. & Myl. 75; *Bugden v. Sage*, 3 Myl. & Car. 683, 687; *Mitchelson v. Piper*, 8 Sim. 66.

1866.

THE CRENVER, &c. MINING COMPANY  
(LIMITED) v. WILLYAMS.

**M**R. JESSEL and Mr. Prendergast for the Plaintiffs.

Mr. Baggallay and Mr. Rowcliffe for Willyams.

*In re Strand Music Hall Company (Limited) (a)* was  
decided.

Mr. Beavan for the assignee of Griffin.

Mr. Jessel in reply.

*The MASTER of the ROLLS.*

This is a suit instituted by the company, praying that  
deed of the 23rd of January, 1865, executed by the  
company, may be declared void as against the company,  
and that it may be decreed to be delivered up to be  
cancelled. The bill also prays for an injunction to re-  
strain the Defendants (who are bankers carrying on  
business at Truro in Cornwall under the name of "*The  
Miners' Bank*") from taking possession of the property  
or effects of the mining company by virtue of this deed,  
and from exercising any powers contained in it against  
the company.

(a) 35 Beav. 153.

if he were the agent of the company, and *semble*, that the security would be valid to  
the extent of the money properly expended by the contractor on the works of the  
company.

VOL. XXXV—III.

A A

Jan. 19.  
Feb. 9.

A bill prayed  
that a mort-  
gage might  
be cancelled  
and for further  
relief, but it  
proved to be  
valid to some  
extent. The  
Court refused  
the relief  
asked, or to  
make a decree  
for redemp-  
tion on pay-  
ment of what  
was properly  
due, and dis-  
missed the  
bill with costs.

A mining  
company, em-  
powered to  
raise money,  
gave a security  
to bankers for  
monies due  
and to become  
due from the  
contractor, to  
whom they  
were indebted:  
—*Held*, that  
though the  
company could  
not guarantee  
the debt of a  
stranger, still,  
that the ad-  
vances to the  
contractor  
might be valid

This



1866.  
  
 THE  
 CRENVER, &C.  
 MINING CO.  
 LIMITED.  
 v.  
 WILLYAMS.

This suit is a striking instance of the advantage derived from the impersonal character of a duly registered joint stock company, and it also conveys a warning to all persons how they deal with companies of this description. On the 23rd *January* in last year (1865), the directors of the company, knowing perfectly what they were doing, and having full power to bind all the shareholders within the legitimate exercise of the powers conferred upon them, executed a deed of mortgage to the Defendants, who, relying upon the validity of that deed, advanced large sums of money. A change of directors takes place, and in the month of *November* following the new directors file the present bill, contending that the act of the previous board was wholly *ultra vires* and that the whole transaction must be set aside.

I am of opinion that two questions arise which I must consider; first, whether the deed of *January*, 1865, was authorized by the constitution of the company to any and if any to what extent, and secondly, if it was not, whether the moneys advanced by the Defendants were applied for the benefit of the company, either in payment of previously existing liabilities of the company, or in defraying the expense of the works of the company.

The company was incorporated in *November*, 1863, for the purpose of acquiring and working certain mines in the county of *Cornwall*. The nominal capital was 150,000*l.* in 30,000 shares of 5*l.* each. The articles of association, to which I shall have presently to refer, were duly registered, and the company took five mines. Afterwards, and about two months after their incorporation (28th *January*, 1864), they entered into a written contract with Mr. *Griffin*, an engineer, who was to undertake to supply materials and construct and erect certain buildings,

buildings, machinery, engines and plant necessary for the proper working of the mines they had taken, the sum of 85,000*l.* to be paid in the following manner, viz. :—one half (being 42,500*l.*) in 17,000 shares paid up to the extent of one-half, that is 50*s.* per share, and the remainder in money. Mr. *Griffin* contracted that he would, before the 1st *August*, 1865, complete the buildings and machinery, in all respects, according to the requirements of the engineer of the company, in a state fit for the immediate working of the company. The payments under the contract were to be made to the contractor every month, on the certificate of the engineer of the company, less twenty per cent., half in cash and half in shares, and the twenty per cent. was to be retained by the directors until the completion of the works as a security for the fulfilment of the contract.

1866.

THE  
CRENVER, &C.  
MINING Co.  
LIMITED  
v.  
WILLIAMS.

On the 30th *June*, 1864, a supplemental contract was entered into between Mr. *Griffin* and the company, making certain arrangements respecting calls on shares, to which I do not think it material more fully to refer. Considerable sums of money were advanced by the bankers to Mr. *Griffin* to enable him to go on with the works, and in the beginning of *January*, 1865, he owed the Defendants upwards of 14,000*l.* for moneys advanced to him. The company also owed the bankers 1,272*l.*, and the company were also liable for 5,000*l.* on bills not then at maturity discounted by the banking company, and which formed part of the 14,000*l.* due from the contractor.

In this state of things, the indenture in question was executed, it bears date the 23rd *January*, 1865, and is made and executed by Mr. *Griffin* of the first part, the Plaintiffs, the company, of the second part, and the Defendants, the bankers, of the third part, it recited the

1866.  
 THE  
 CRENVER, &C.  
 MINING Co.  
 LIMITED  
 v.  
 WILLYAMS.

contract with *Griffin*, and that he had since constructed divers of the works contracted for, and had erected divers buildings, machinery, &c, and had supplied material for the same in pursuance of the contract; and further recited (as the facts were) that *Griffin* had received 19,578*l.* from the company in part payment and 6,266 shares 2*l.* 10*s.* paid up, and 1,423 shares 2*l.* 15*s.* paid up, and that a large sum still remained due to him from the company under the contract. That *Griffin* was possessed of machinery and timber, and that he was indebted to Messrs. *Willyams* in 14,239*l.* for moneys advanced for the purpose of the said contract, and that the company was indebted to Messrs. *Willyams* in the sum of 1,272*l.* for moneys advanced and that *Griffin* had applied to Messrs. *Willyams* to make further advances to enable the contract to be carried out, which they had agreed to do on having the repayment of the 14,289*l.* and 1,272*l.* and any other sums advanced by them to *Griffin* secured as after appearing. *The indenture then witnessed*, that *Griffin* and the company covenanted to pay to Messrs. *Willyams* the 14,239 and 1,272*l.* with all further sums advanced to *Griffin* with interest. And *Griffin* assigned to Messrs. *Willyams* all moneys due or to become due under the contract, and all engines and timber, &c., and the company assigned to Messrs. *Willyams* all tin, copper, &c., to be raised out of the mine. This was made subject to redemption on payment of the moneys covenanted to be paid, and the deed contained a power of sale in default of payment.

The first question is, whether, having regard to the articles of association, this was a valid instrument to an and if any to what extent. The clauses of the articles which relate to this subject are as follows:—

By the 81st section of the articles, it is provided, that no purchase, sale, contract or agreement, made by the company, shall be valid, unless it be entered into by the directors, and be countersigned by the secretary.

entered into by the promoters or directors, or act done by the directors, to which the assent of the company in general meeting should have been given, should be afterwards impeached as *ultra vires*.

1866.

THE  
CRENVER, &C.  
MINING Co.  
LIMITED  
v.  
WILLIAMS.

By the 83rd section, the directors are empowered to raise any sums, by mortgage of all or any part of the company's estates or otherwise as therein mentioned.

By the 84th section it is provided, that all securities made on behalf of the company, may be made in such form and may contain such powers, &c., including powers of sale, as the directors shall think fit, and shall be sealed with the seal of the company and countersigned by the secretary, and when so signed, sealed and countersigned, shall be valid and conclusive and enforceable against the company without the necessity of proving any other matters than their having been executed in the manner aforesaid.

It certainly is very difficult to say that a mortgage of the property of the company to secure a debt due from their contractor to the bankers of the company, falls within the scope of the powers of the directors or within the contemplation of the 83rd clause of the articles. But, on the other hand, it is very difficult to say that the indenture of mortgage of *January*, 1865, is wholly void, and that it ought not to stand as a security for anything.

At the date of the indenture, as I have already stated, the Defendants had discounted acceptances of the company for 5,002*l.*, which bills had not then arrived at maturity, but were still running and about to become due from the company. There was also a further sum of

1866.  
 THE  
 CREEVER, & C.  
 MINING CO.  
 LIMITED  
 v.  
 WILLYAMS.

of 1,272*l.* 1*s.* 7*d.* due from the company to the Defendants, and, in truth, the Plaintiffs, by their counsel at the bar, offer to pay these two sums to the Defendants, not, they say, as the price to be paid for cancelling the indenture, but out of their bounty, because they really owe the money which they are willing to repay. But I am of opinion, that to give security for these two sums of money was within the scope and authority of the directors, and that they are properly secured by the deed. I am not acquainted with any case where a Court has ordered a deed to be delivered up to be cancelled where it was a valid security for any sum of money. In truth, in all those cases in which the Court has, by its decision, partially affected the validity of a deed (as for instance where it has set aside the sale of reversions for the ground of inadequate consideration), it has not directed the deed to be cancelled, but has declared that it should stand as a security for the money actually paid for the purchase of the reversion and for interest upon that amount. The bill here does not contain any prayer or offer to that effect. It states, no doubt, in paragraph twenty-three, that endeavours were made for a compromise on that footing, but, as the bill stands, it simply asks for an injunction to restrain the Defendants from acting upon the powers contained in that deed and for the delivery up and cancellation of the deed itself.

It is also difficult to say that the right of the Defendants under that deed would be confined to making the mortgage a security only for these two sums. The company expressly covenant that they will pay any sum of money to be advanced after the date of the deed to the contractor, Mr. *Griffin*. Now it is unquestionably true, that it would not be within the scope of the authority of the directors to guarantee the payment of a debt

to

to be contracted thereafter between a stranger and his banker, in which the company had no concern; but if the directors think fit to constitute a person their agent or servant for a particular purpose, and undertake to repay the money to be advanced to that servant or agent, as if it were advanced to them, I am not aware of any principle or authority which, in that view of the case, would enable the principal to repudiate the payment made to his agent by his authority. If so, it requires this deed to be examined, to see whether the true scope and construction of it is not, in effect, to make Mr. *Griffin* their agent for the receipt of the moneys, to be applied by him for the purpose of the buildings and works which he was directed to construct and perform for the use of the company. If this be taken as the true construction of the mortgage deed, then upwards of 9,000*l.* have, since the execution of the deed, been advanced by the Defendants to Mr. *Griffin* on behalf of the Plaintiffs. If he was the Plaintiffs' agent, it was not necessary for the bankers to see how the money was applied. But even if this construction could not be put on the indenture of *January*, 1865; still, in my opinion, it would be difficult to hold that the Defendants, the bankers, would not be entitled, under the covenant I have referred to, to claim against the Plaintiffs, the company, all such sums of money as were paid by the Defendants to Mr. *Griffin*, and were by him properly expended on the works performed by him for the company. This, as I understand it, amounts to the sum of 7,485*l.*, which has been certified by the engineer of the company to have been properly expended.

To this it is urged, that an action has been brought for this amount, and that only 2,294*l.* or thereabouts  
has

1866.  
THE  
CRENVER, & C.  
MINING Co.  
LIMITED  
v.  
WILLIAMS.

1866.  
THE  
CRENVER, &C.  
MINING Co.  
LIMITED  
v.  
WILLYAMS.

has been recovered, and this must, therefore, be taken to be the full amount which could be recovered under the covenant. If that question has been so decided at law, it would unquestionably govern my decision here, where the same points arise, but I do not so understand what took place in the action, nor do I see anything in the deed itself, or in the acts of the parties, which limits the security of the Defendants for the repayment of the sums advanced by them to two-fifths of the value of the works actually completed by *Griffin*, although the Defendants may have been cognizant of a former arrangement between the Plaintiffs and *Griffin*, by which they were to make payment to him of two-fifths of what was due to him in shares of the company, and the retention of the remaining one-fifth for the security of the completion of the works, which arrangement is not referred to in the indenture in question. If I came to the conclusion that nothing whatever was due on the deed itself, and that it would stand as a security for no sum of money at all, there would still arise a question, which, in my opinion, is one of considerable nicety, viz., whether the 84th clause of the articles makes the mortgage valid. It is argued, no doubt very plausibly, that this clause only applied to the form of the indenture, and that it cannot extend to rendering valid a mortgage which is confessedly otherwise void, as being wholly unauthorized by the articles of the association. At the same time, it may reasonably be argued, that if the directors think fit to raise money at exorbitant interest, far exceeding the market rate, or to give an extravagant premium for loans, this is a matter of contract between the parties; and if a mortgage is made to secure the payment of such a sum, this clause would render it valid, however extravagant it might be, provided it was not tainted with fraud. It is obvious that some meaning would

would be given to it, if it were confined to the form of the deed. It is obvious that it could not alter the construction of any deed, nor make that a mortgage which did not purport to be one; and it is to be observed, that the words are quite general, and refer to all deeds, mortgages and the like, made and executed on behalf of the company; and it was obviously intended to relieve any person dealing with the company from any apprehension as to the validity of their security on which they had *Bonâ fide* advanced money, when once that security had been duly executed, in the form specified in that article. And it is also to be observed, that if I am right, this deed was a good mortgage, to the extent at least of the moneys then actually due from the company to the Banker.

1866.

THE  
CRENVELL, & C.  
MINING CO.  
LIMITED  
v.  
WILLIAMS.

I am of opinion, however, that it is not necessary for me to decide that point on the facts established before me. I am of opinion that the indenture of *January*, 1865, is a valid security for something due from the Plaintiffs to the Defendants, and being of that opinion, it is impossible that I should decree its cancellation. Neither, in my opinion, could I permit the Plaintiffs to alter the frame of this suit and turn it into a bill for the redemption of the property, on payment of so much only as was or could be properly secured by the instrument itself. The bill contests the validity of the deed *in toto*; it alleges that in part it was obtained by fraud and undue influence, in which allegation it signally fails. It is also an attempt to get out of a contract and arrangement deliberately entered into by the company, the defects of which they, above all others, must be taken to have been cognizant of at the time of its execution, and by reason of which they obtained large sums of money to be laid out on their works.

The



1866.  
  
 THE  
 CRENVER, & C.  
 MINING CO.  
 LIMITED  
 v.  
 WILLYAMS.

The bill must, therefore, in my opinion, be dismissed with costs, without prejudice to their filing any other bill they may be advised for the redemption of the property.

### WALMESLEY v. PILKINGTON.

March 1, 2, 6.

Premises were demised for three lives and for twenty-one years after the death of the last survivor. The lessor covenanted with the lessee that if he should "lose a life," and think proper to have a new life put in, then, within six months after the death of the first life, and so on continuing the term and estate thereby demised" the lessor "would put in a new life."—*Held*, that the lessee had power to introduce one new life only, and that one in the place of the first life dropping, but with a new term of twenty-one years, commencing with the death of the survivor of the two survivors and the new life.


THE question, in this case, was as to the construction of a covenant for renewal contained in a lease.

By an indenture, dated the 5th of *February*, 1765, Mr. *Cotham* demised the hereditaments in question to *William Traverse*, to hold the same from the date thereof, "for and during the term of the natural and several life and lives of him *William Traverse*, about twenty-seven years, *Elizabeth Traverse* his daughter, about five years, and *Henry Sale*, aged about eleven years, and for the life of the survivor and longest liver of them; and also for and during the term of twenty-one years, to be compleated from the time of the death or decease of the survivor of them the said *William Traverse*, *Elizabeth Traverse* and *Henry Sale*, and from thenceforth to be compleated and ended," at a rent of 14s.

The lease contained the following covenant by *Cotham* with *Traverse* :—

"And further, if the said *William Traverse*, his heirs, executors, administrators or assigns shall happen to lose a life, and he or they think proper to have a new life put in, then, within six calendar months after the death of the first life, and so on continuing the term and estate hereby

hereby demised, he the said *William Cotham*, his heirs and assigns, and them, their and every of their heirs and assigns shall and will put in a new life, after the rate and value of three years' value of the ground rent to the front, he the said *William Traverse* paying for the new lease."

1866.  
  
 WALMESLEY  
 v.  
 PILKINGTON.

One of the three lives dropped in 1811, and the trustees of the will of the lessor granted a new lease to *William Bonney* in whom the old lease was then vested. By this lease, dated the 30th of *January*, 1811, the trustees "in pursuance of and in conformity to the covenant," in the lease of 1765, demised the premises (except the minerals) to *William Bonney*, to hold for and during the term of the natural lives of *Elizabeth Traverse*, daughter of the said *William Traverse* deceased, now of the age of fifty years, and *Henry Sale* of *Wigan* in the said county, yeoman, now of the age of fifty-six years or thereabouts, the now surviving lives in the said recited lease named, and of *William Bonney* (son of the before-named *William Bonney*) now of the age of four years or thereabouts, and for and during the lives and life of the survivors and survivor of them, and from and immediately after the death of such survivor to hold the same unto the said *William Bonney*, his executors, administrators and assigns for and during the further term of twenty-one years thence next ensuing.

*Elizabeth Traverse*, the last of the three original lives, died on the 13th of *November*, 1839, and if no new life had been introduced, the lease would have expired on 13th *November*, 1860. *William Bonney*, the last life, introduced in 1811, died on the 30th of *January*, 1861.

This suit was instituted, in *June*, 1864, by the parties representing the lessors, against those representing the lessees.

1866.  
 WALMESLEY  
 v.  
 PILKINGTON.

lessees. The Plaintiffs submitted that the granting of the lease of 1811 by the trustees was, as to the therein superadded term of twenty-one years, a breach of trust, of which the lessee, and every person deriving title through or under him, had all along full notice; that such lessee acquired under the lease of 1811 no new estate or interest, effectual in equity, except for the new life, and that a term of twenty-one years, computed from the decease of the survivor of the three lives named in the said original lease of 1765, having run out when *William Bonney* died, the legal term of twenty-one years vested in the Defendant as a trustee for the Plaintiffs, as deriving title under *Cotham*, the lessor.

The bill prayed a declaration that the premises were vested in the Defendant in trust for the Plaintiffs, and for a surrender.

The Defendant insisted, that under the lease of 1811 he was entitled to hold the demised premises for the term of twenty-one years from the death of *William Bonney*, and that such lease was valid.

Mr. *Selwyn* and Mr. *C. Hall* for the Plaintiffs.

Mr. *Baggallay* and Mr. *Little* for the Defendant.

---

*The MASTER of the ROLLS.*

March 6. The question is, whether the lease of 1811 was valid, in so far as it added a term for twenty-one years to the putting in of the last of the three lives constituted by the lease of 1811.

It is argued very strenuously that the original lease is

is distinct on this point, and that the twenty-one years are to be added to the life of the last survivor of *William Traverse*, *Elizabeth Traverse* and *Henry Sale*, and that it would be a complete alteration of the lease to introduce twenty-one years after the decease of the survivor of *Elizabeth Traverse*, *Henry Sale* and *William Bonney*. I have felt considerable hesitation on the construction of this covenant, but, on the whole, my opinion is, that the meaning of the words expressed in the covenants is, that the lessee is to be at liberty to introduce a new life in the place of the first life that dropped, and no more, and that thereupon all the provisions and directions that applied to the life that dropped should be substituted for the life introduced. That, in other words, the lease should be read as if dated in 1811, with the name of *William Bonney* in the place of the name *William Traverse* as regards the duration of the lease.

1866.

WALMESLEY  
C.  
PILKINGTON.

It is necessary to look very closely at the words, if *William Truverse* "shall happen to lose a life, and think proper to put in a new life within six calendar months after the death of the first life." Up to this point, it is, in express words, confined to one new life, and that, on the occasion of the putting in of the first life that drops. What is there to extend this? The next words are, "and so on continuing the term and estate hereby demised."

On the one hand, this is argued to mean that the lessee is to be at liberty to put in three lives, one for each of the three mentioned in the original lease, as they respectively drop. On the other side, it is argued, that this means that the new lease is to contain this same covenant, and that this amounts to a perpetual renewal.

I dissent

1866.

WALMESLEY  
v.  
PILKINGTON.

I dissent from both arguments; I think that the words of the covenant mean, that the lessee is entitled to put one new life into the lease, and one only, and that one in the place of the first that drops, and within six months after the falling in of it, leaving all other the same, changing what ought to be changed for the purpose of making the whole of the rest of the lease homogeneous to such alteration, and that the words "on continuing the term and estate hereby demised" mean that the rest of the renewed lease shall give to the lessee the same term and estate as he had by the original lease, but without the power of adding a second life. That term and estate was for three lives, and the life of the survivor and twenty-one years afterwards. The words "hereby demised" do not, as I understand them, mean the lives of *William Traverse*, *Elizabeth Traverse* and *Henry Sale*, and the life of the survivor of these three persons, but the three lives generally, on which the duration of the lease was to depend, whoever they might be who were put into the lease, and the life of the survivor. In other words, that the expression refers generally to three *cestuis que vie* and the survivor, and not to the particular *cestuis que vie* specified in the original lease. Were it not so, this covenant would give the lessees no benefit. One of the three original lives was twenty-two years older than one, and sixteen years older than the other of the lives; it might reasonably be expected that this life would drop first, and accordingly it did so drop. If the twenty-one years were only to be added to the survivor of the two younger and remaining lives, it was probable that the addition of a new life would give the lessee no benefit and that the twenty-two years by which the elder life exceeded that of the youngest life would, if the duration of all the lives were the same relatively, be an equivalent or nearly so, to the duration of the new life added.

And, accordingly, so it turned out; the new life only survived the youngest of the three original lives by twenty-one years and two months. But this covenant points to a benefit to the lessee; the lessee is to pay the costs of it, and also to give "three years' value of the ground rent to the front." My opinion is, that the best and most rational construction which can be given to the words of this covenant is, that the renewed lease is, in all respects, to be the same as the original lease, except that the name of one *cestui qui vie* is to be substituted for the name of one that had died, and that no new life is afterwards to be added.

1866.

WALMESLEY  
v.  
PILKINGTON.

Having come to this conclusion, it is unnecessary for me to go into various of the contentions which were argued before me. I may, however, state, that there is only one that appeared to me to require any notice, which was, whether as the renewed lease reserved the minerals under the property demised, the fact that *William Penkett Cotham*, who was owner in fee of the income of the property demised, did, since the renewed lease was granted, *viz.*, on 14th January, 1842, and with the knowledge of its contents, grant a lease of the minerals under the demised land; this, if the fact be so, constituted such an acquiescence in the renewed lease so granted, as to bind him and to bind all persons claiming under him. On this, the fact not being ascertained, I express no opinion, as, on the construction, I think, the covenant becomes under it superfluous. A lease to a similar effect was made by the trustees, who are the present Plaintiffs, in August, 1853, but this is immaterial, as they could not bind their *cestui que trust*, and if the renewed lease was invalid, they could not, by any acquiescence of theirs, render it valid.

It is proper, however, to observe, and this confirms  
the

1866.  
WALMESLEY  
v.  
PILKINGTON.

the view I have expressed of the covenant, that a renewed lease was, in any view of the case, absolutely necessary; and that no alteration could have been made in the original lease. The question is the contents of such renewed lease. I think that it was to be the exact counterpart of the original lease, changing simply the name of *William Traverse* for that of *William Bonney*, in all cases where the name of *William Traverse* was used as one of the *cestuis qui vie*, and omitting the covenant for a renewed life. The renewed lease did not, in fact, do this exactly, but the variations are not material; probably as much was given up on one side as was given up on the other, but this does not amount to a valuable consideration for buying or relinquishing anything on either side, nor was this the moving cause for granting the lease, the parties dealing on this footing:—they believed the lessees were entitled to have a life substituted in the place of *William Traverse*, with all the consequences flowing from it, and they granted and the others accepted such a lease accordingly.

The consequence of this is, that, in my opinion, the case of the Plaintiffs fails, and the bill must be dismissed with costs.

---

1866.

*Re KITTON.*

Jan. 11.

**M**R. *KITTON*, a solicitor of this Court, alleging that *Mr. Cobbold* and *Sir Samuel Bignold* had jointly employed him as their solicitor in an arbitration matter, delivered his bill of costs and commenced an action at law against them to recover the amount.

In ordering the taxation of a bill claimed against two persons, the Court gave both liberty to question the retainer, and directed the Taxing Master to distinguish by and to whom each sum found due was to be paid.

*Mr. Cobbold* alone (*Sir Samuel Bignold* declining to join) took out a summons for the taxation of the bills and to stay the proceedings at law in the meantime.

The only question was as to the form of the order.

*Mr. Selwyn* and *Mr. Druce*, in support of the petition, cited *Ex parte Hair* (a) ; *Re Lewin* (b).

*Mr. Jessel* for *Mr. Kitton*.

*Mr. Wickens* for *Sir Samuel Bignold*.

The MASTER of the ROLLS directed the action to be stayed, and, in addition to the usual order for taxation of the bill, he ordered that *Mr. Cobbold* and *Sir Samuel Bignold* should be at liberty to question the retainer by them or either of them. He also directed the Taxing Master to distinguish by and to whom each sum by him found due was to be paid.

(a) 10 Beav. 187.

(b) 16 Beav. 608.

---

*Reg. Lib. 1866, A. fol. 193.*



1866.

Feb. 28.  
March 13.

## EARL HOWE v. EARL OF LICHFIELD.

Legacy and not succession duty held payable on the produce of an estate of a testator sold by trustees.

A testator devised real estate to trustees in trust by sale or mortgage to raise 20,000*l.*, and subject thereto he devised the estate to his son. The trustees sold part of the estate, but, before the contract had been completed, the trustees were paid, and the estate was conveyed to the son, who adopted the contract:—*Held*, that legacy and not succession duty was payable on the purchase-money.

All that the purchaser of devised real estates can

require in respect of succession duty is, distinct evidence that no claim will be made by the Inland Revenue Office for any duty on the hereditaments sold by reason of the death of the testator. If the Inland Revenue Office distinctly state this, it is sufficient, and the office cannot be compelled to give a certificate in any particular form.


THIS was nominally a suit for specific performance, but the real question was, whether the Plaintiffs had produced to the Defendant the proper evidence, that no claim was or could be made from the Inland Revenue Office for succession duty or legacy duty in respect of the hereditaments contracted to be bought by the Defendant.

The testator, the Honorable *Robert Curzon*, made his will dated the 3rd of *October*, 1862, by which he left all his freehold and copyhold hereditaments to the Plaintiffs (Earl *Howe* and Mr. *Dugdale*) in trust, by sale or mortgage, to raise 20,000*l.* together with the costs for the purposes mentioned in his will, and subject to these trusts and subject to any mortgage affecting the same, he demised the estates in trust for his son, the Plaintiff *Robert Curzon*, his heirs and assigns for ever, and he appointed him sole executor of his will.

The testator died in *May*, 1863, and the will was proved in *August*, 1863, by his son, the Plaintiff *Robert Curzon*.

On the 14th of *October*, 1863, the trustees, in exercise of the trusts reposed in them by the will, caused the *Hagley* estate, being part of the estates so devised, and which

which was subject to a mortgage of 12,500*l.* created in 1855, to be put up for sale by auction, and lots two and fifteen were knocked down to the agent of the Defendant on his behalf, the contract was duly signed, and the deposit money paid. The title had been accepted, subject to the question already stated as to succession or legacy duty payable on the purchase-money.

1866.  
  
 HOWE (EARL)  
 v.  
 EARL OF  
 LICHFIELD.

On the 14th of *July*, 1864, the mortgagees of the property had been paid off, and the 20,000*l.* paid to the trustees out of the purchase-money of the other lots of the *Hagley* estate. By an indenture dated the 15th of *July*, 1864, the mortgagees, with the concurrence and by the direction of the Plaintiffs, the trustees, conveyed the hereditaments in question to the Plaintiff, *Robert Curzon*, in fee, discharged of the mortgage. The Defendant's counsel thereupon stated, that, as Mr. *Curzon* was then to be considered as the vendor, it must be shewn that succession duty had been paid. The legacy duty, which exceeded in amount the succession duty, had been paid, but the Defendant contended, that succession duty was properly payable, and that he was entitled to the usual certificate, under the statute, that all succession duty has been discharged. After much correspondence, the parties agreed on a case to be submitted to the Inland Revenue Office, and, in answer to this statement, Mr. *Trevor* (the comptroller of legacy and succession duties) wrote a letter, dated the 29th of *May*, 1865, in the words following:—

“I beg to acknowledge the receipt of your letter of the 17th inst., and to observe, that legacy duty appears to have been properly paid, under the 4th and 5th sections of the 45 *Geo.* 3, c. 28, for the proceeds of the sale of the real estate sold under the directions contained in the will of the late Honorable *Robert Curzon*, and

B B 2

being

1866.  
 Howe (Earl)  
 v.  
 Earl of  
 Lichfield.

being so paid, there is no charge on the property so sold under the 16 & 17 Vict. c. 51."

The advisers of the Defendant were still unsatisfied, and made a visit to the authorities at the office of the Inland Revenue, when, upon their statement, the officer of that department expressed an opinion that succession and not legacy duty was payable. Thereupon Messrs. *White & Co.* (the Defendant's solicitors) wrote a letter to Mr. *Trevor* on the 20th of *June*, 1865, suggesting the form of a certificate to be signed by him, certifying that all duty in respect to the land purchased [specifying it] had been paid and discharged, and "that the Inland Revenue Office had no further claim for legacy or succession duty in respect thereof."

In answer to that application, Mr. *Trevor* wrote a letter, bearing date the 21st of *June*, 1865, as follows:—

"Inland Revenue Office, *London*, E.C.

"Legacy and Succession Duty Department.

"21 *June*, 1865.

"Gentn.—In reply to your letter of the 20th inst., I beg to state that the duty at the rate of 1*l.* per cent. amounting to 51*l.* 19*s.* 8*d.* appears to have been paid, on the 24 *April*, 1865, upon a sum of 5,198*l.* 11*s.* 6*d.* (4,823*l.* 5*s.* 3*d.* principal and 373*l.* 6*s.* 3*d.* interest thereon), described to be the proceeds of the sale of the following property, viz. a close of land called *Burnt Hill* containing 4*A.* 3*R.* 28*P.*, and certain other closes of land called *Bullock's Moor* and *Flaxley Green Piece* containing 43*A.* 4*R.* 0*P.*, being part of the *Staffordshire* estates of the late Honble. *Robt. Curzon* (who died on the 14th *May*, 1863), and which are devised to his son *Robt. Curzon*.


"Yours, &c.

"*Ch. Trevor*.

"Messrs. *White, Broughton & White*."

The

The Defendant's advisers being still dissatisfied with this answer refused to complete, and threatened to bring an action for the deposit money, and thereupon this bill was filed, praying for the specific performance of the contract.

1866.  
  
 HOWE (EARL)  
 v.  
 EARL OF  
 LICHFIELD.

Mr. Selwyn and Mr. G. O. Morgan, for the Plaintiffs, referred to "*The Succession Duty Act, 1853*," 16 & 17 Vict. c. 51, ss. 18, 44, 52; and see the *Stamp Act, 45 Geo. 3, c. 28, ss. 4, 5*, and 55 Geo. 3, c. 184, *Schedule, Part 3, tit. Legacies*.

Mr. Hobhouse and Mr. Cecil Russell, for the Defendant, cited *Hobson v. Neale* (a).

---

*The MASTER of the ROLLS*, after stating the sale by the trustees to the Plaintiff, said:— Mar. 13.

If the matter had rested there, no question could have arisen, but that legacy duty and not succession duty was properly payable in respect of the purchase-money to be produced by this sale.

What took place subsequently was this:—[The Master of the Rolls stated the subsequent facts down to the filing of the bill and proceeded: ]—

A suit founded on a more unfortunate contention can scarcely be conceived. I have considered the matter as carefully as I could, and, in my opinion, the Defendant has been ill-advised and must submit to a decree. In the first place, all that the purchaser can require is distinct evidence that no claim will be made by the Inland Revenue Office for any duty on the hereditaments mentioned by reason of the death of the testator.

I am

CASES IN CHANCERY.

1866. I am of opinion that if the Inland Revenue distinctly  
stated this, the vendor is not compellable to institute  
proceedings against the Inland Revenue to compel them  
to give a certificate in a particular form, although it be  
that specified in the statute.

WE (EARL)  
v.  
EARL OF  
JICHFIELD.

I am also further of opinion, that the case was fairly  
stated to Mr. *Trevor* and that his answer was decisive,  
that the proper duty had been paid.

I am also further of opinion, that his second answer  
to the solicitors of the Defendant was decisive, that no  
more duty could be claimed, and I am of opinion that  
after these two letters (assuming the rest of the title to  
be unobjectionable) no purchaser could resist the per-  
formance of his contract in future, on the ground that  
any claim for duty could be made by the Inland Revenue  
Office. I think the case was fairly stated, and also that  
the Defendant is not entitled to compel the Inland  
Revenue to give a certificate in a particular form.

I am therefore of opinion, that it is immaterial whether  
legacy duty or succession duty was payable originally.

I have, however, thought it necessary, in consequence  
of the contention, to go into that question, and I am of  
opinion that legacy duty was payable and not succession  
duty. On this point, the sole question is, whether the  
sale was made under the power given to the trustees, or  
whether the sale was made by Mr. *Robert Curzon* as  
owner in fee simple, and I think that the sale was made  
under the powers given to the trustees, the original  
Plaintiffs, by the will of the testator.

The original sale was obviously so, the contract was  
with them and solely with them, there was no contract  
with

with *Robert Curzon*. It is true that, by means of subsequent conveyances, the whole of the property in fee simple was vested in him and that he alone became the necessary party to convey; but this circumstance did not alter the original contract or make him the seller. The proof of this is, that if the Defendant had filed a bill for the specific performance of this contract and had made *Robert Curzon* a Defendant to such suit and a demurrer had been put in by him, that demurrer would have been allowed. The parties to the contract were the trustees on one side, and the Defendant on the other, and they also were the necessary and proper parties to this suit, and *Robert Curzon* was, in my opinion, properly omitted in the first instance, for being a co-Plaintiff he need not, notwithstanding the contention of the Defendant, have been made a party to this suit.


1866.

HOWE (EARL)  
v.  
EARL OF  
LICHFIELD.

If the original contract had been cancelled by consent of both parties and a fresh contract entered into with *Robert Curzon*, the matter would have been different; but this is not so, there is no trace of anything to this effect in the evidence or pleadings. It is simply a case of this description:—

The original vendors have, by subsequent proceedings and deeds which they have sanctioned, vested the whole of the legal estate and equitable interest in the hereditaments, free from all charges, in *Robert Curzon*. But this does not affect the original contract, which was perfectly valid when they entered into it, and which they are bound to perform, either personally or by procuring the conveyance of the property from the person in whom they have vested it or allowed it to become vested.

The error of the Defendant is, in supposing that the transactions which have taken place since the sale in October, 1863, have substituted a new contract for the old

1866.  
  
 HOWE (EARL)  
 v.  
 EARL OF  
 LICHFIELD.

old one. But this is not so; it is the old contract which constitutes the sale, and which alone can be enforced, although the powers to convey are altered by the subsequent acts of the parties. In equity, assuming the contract to be executed, all the interests in equity were complete the moment the contract was signed; from that moment the Defendant was the owner of the estate in equity, and although, if he had taken a conveyance the next day, the trustees would have been the parties to convey, and because a year elapsed, the son and devisee of the testator became the party to convey, it does not affect the real sale, which was under the powers of the will, to which the final conveyance of the legal estate is a mere accessory, and which completes at law, in 1866, what was complete in equity in 1863.

I am, therefore, of opinion that the Plaintiff is in the right, and that he is entitled to a decree, and that the Defendant must pay the costs of the suit.

---

FRENCH v. SEMPLE.

Mar. 8.  
 A Defendant  
 having died  
 before answer,  
 an order to  
 revive and also  
 to answer was  
 made against  
 his personal  
 representative  
 under the  
 15 & 16 Vict.  
 c. 86, s. 52.

IN this case, one of the Defendants had died before he had answered the interrogatories to the bill which had been filed.

Mr. *Beavan* moved for an order to revive against his personal representative, and that such representative might answer the interrogatories within a limited time. He referred to the 15 & 16 Vict. c. 86, s. 52, and to the statement of Lord *Redesdale* (a), where it is stated, "if a Defendant

(a) *Mitford's Plead.* p. 76, 4th edit.

a Defendant to an original bill dies before putting in an answer, or after an answer to which exceptions have been taken, or after an amendment of the bill to which no answer has been given, the bill of revivor, though requiring in itself no answer, must pray that the person against whom it seeks to revive the suit may answer the original bill or so much of it as the exceptions taken to the answer of the former Defendant extend to or the amendment remains unanswered." And after stating that the suit may be revived in eight days after appearance, unless cause shewn, he says: "Though the suit is revived of course in default of the Defendant's answer within eight days, he must yet put in an answer, if the Bill requires it." He submitted that the order asked was "an order to the effect of the usual order to revive," authorized by the 52nd section of the act.

1866.

FRENCH  
v.  
SEMPLER.

*The MASTER of the ROLLS.*

I think I can make the order giving the representative the usual time to answer. It is not necessary to put the Plaintiff to the expense of filing a bill of revivor in order to obtain an answer.

---

**NOTE.**—See *Earl Beauchamp v. Winn*, 2 Law R., Eq. 302, and 14 Law T. 856.

---



1866.

## SMITH v. DRESSER.

Mar. 2, 5.

Trustees under a creditors' deed, in the Form D. of the Bankrupt Act, realized the assets, but the deed afterwards proved invalid (the requisite number of creditors not having assented to it) and the debtor was made bankrupt:—  
*Held*, that the trustees were not entitled to their costs and expenses of administering the estate, the deed under which they acted being totally void.

*HODGSON*, having a judgment debt entered up against him, executed a creditors' deed, dated the 25th of *January*, 1864, in the form D. to the Bankrupt Act (24 & 25 *Vict.* c. 134, s. 200), by which he conveyed all his estate and effects to *Dresser* and *Herring* "absolutely, to be applied and administered for the benefit of the creditors of *Hodgson*, in like manner as if he had been, at the date thereof, duly adjudicated bankrupt."

On the 13th of *May*, 1864, *Hodgson* was adjudicated a bankrupt, the commissioner holding that "a majority in number, representing three-fourths in value of the creditors," had not assented to the creditors' deed. *Smith* was appointed his assignee.

Afterwards, by a decree made in *June*, 1865, in a suit of *Harle v. Herring*, instituted to carry into effect the trusts of the creditors' deed, the Master of the Rolls held that the creditors' deed was void as against *Smith*, the assignee. The Defendant *Dresser* was a Defendant to that suit.

*Dresser* and *Herring* had, under the trusts of the creditors' deed, got in and converted part of the estate and effects of *Hodgson*, and had placed it (700*l.*) in their joint names in a bank. After the decree, *Smith* required *Dresser* and *Herring* to pay over this sum to him. *Herring* was willing to do so, but *Dresser* refused to concur unless he was allowed the costs and expenses incurred by him as trustee under the deed of *January*, 1864.

*Smith* v. *Dresser* 13

*Smith* and *Herring* instituted this suit in *October*, 1865, against *Dresser*, to compel *Dresser* to concur in enabling *Smith* to obtain payment of the 700*l*.

1866.

SMITH  
v.  
DRESSER.

The question was as to the right of the Defendant to the costs of administering the trusts and of this suit.

*Mr. Southgate* and *Mr. Bush* for the Plaintiffs. The deed of *January*, 1864, is void, not only under the *Bankrupt Act*, as divesting *Hodgson* of the whole of his property, but also under the 13 *Eliz. c. 5*, its object being to defeat the judgment. The deed being void, the trusts were also void, and no one can properly be said to be a trustee acting under it. The Defendant cannot be treated as a trustee or entitled to his costs and expenses in acting under such a deed; *Elsey v. Cox* (a).

*Mr. Cole* and *Mr. Freeling* for the Defendant. The deed is not altogether void; it was valid as a conveyance of the property, which it vested in *Dresser* and *Herring* as trustees, and remained so until subsequent circumstances avoided it. The Plaintiff cannot recover the fund without paying the costs of realising it. The circumstances were such as to justify the trustees in acting under the deed, and it would be unjust to make them bear the costs.

They cited *Symons v. George* (b); *Daking v. Whimper* (c); *Goldsmith v. Russell* (d).

The

(a) 26 *Beav.* 95.  
(b) 3 *Hurl. & C.* 68.

(c) 26 *Beav.* 568.  
(d) 5 *De G., M. & G.* 547.

1866.

SMITH  
v.

DRESSER.

Mar. 5.

*The MASTER of the ROLLS*, after stating the facts, said,—

Three-fourths in value of the creditors of *Hodgson* did not execute the deed of the 25th of *January*, 1864, and the consequence was, that it had no validity under the act, and being a conveyance of his estate and effects to two persons, by a debtor, in order to defeat the payment of the judgment debt, the deed was void as regards all the creditors of *Hodgson*.

In my opinion, the Defendant has mistaken his position in this matter; he was appointed trustee under a deed the trusts of which were all invalid; he was or ought to have been aware of this fact when he began to act in the trusts; he should have taken no steps in it until he was satisfied that three-fourths in value of the creditors had executed the deed, and a little inquiry would have set this clear, though on the form of the deed the contrary is alleged. But whether it were so or not, I cannot give the Defendant costs as a trustee, when, in fact, he was no trustee at all. I cannot allow the first trust, viz., that for payment of the charges and expenses to be paid, to be good, and yet hold all the other trusts to be void. What a trustee is entitled to have is, the costs of executing his trusts, but if the trusts are invalid he has no trusts to execute.

It is said, that this deed is effective for the purpose of conveying the property thereby purported to be conveyed. Assuming this to be so, the trustee has thereby incurred no costs, and, as all the trusts are void, he can have incurred no costs or expenses which could be allowed by this Court for the performance of that which is, in truth, nothing, a mere invalid and inoperative trust.

In one sense, no doubt, the Defendant is a trustee, as every man is a constructive trustee who has in his possession property belonging to another, of which he did not culpably obtain possession; but this is only as every debtor is a trustee of the money he owes to the creditor. Unless adverse claims are made to the money in his hands, he cannot properly be called a trustee, even constructively, but where no such claims are made he is simply a debtor.

Such is the position of the Defendant Mr. *Dresser*, the trusts being void, he had no duty to perform, and he ought to have paid over the money at once to the assignee, no claim by any other person having been made, or being about to be made against the money in his hands. In truth, he was the less justified in causing this suit to be instituted, as, in the case of *Harle v. Herring*, to which he was a party, he had ascertained, by the decree of the Court, that the trusts of the deed of *January*, 1864, were wholly void, and that he could not therefore claim any of the rights incidental to a trust which, in truth, never existed.

I must make a decree for the Plaintiff, and as Mr. *Dresser* has occasioned this suit, he must pay the costs of it.

---

1866.

SMITH  
v.  
DRESSER.

1866.

~~~~~

GRAY
v.

ADAMSON.

Ford v. The Earl of Chesterfield (a) was cited: and see *Ford v. White* (b); *Davis v. Whitmore* (c); *Furber v. Furber* (d).

The MASTER of the ROLLS.

When he was served he ought to have offered to execute any deed which might be necessary. I can give him no costs.

(a) 16 *Beav.* 516.(b) 16 *Beav.* 120.(c) 28 *Beav.* 617.(d) 30 *Beav.* 523.

In re ST. CUTHBERT LEAD SMELTING
COMPANY.

Feb. 27.

Liberty to a mortgagee, pending a winding up, to institute a suit for foreclosure refused, there being no special difficulty, and it being competent to him to obtain the proper order in Chambers without the necessity of a suit.

AN order having been made to wind up this company,—

Mr. *Selwyn* and Mr. *Freeling*, on behalf of a mortgagee, moved, under the 87th section of "The Companies Act, 1862" (25 & 26 *Vict.* c. 89), for leave to institute a foreclosure suit against the company.

They cited *Walker v. The Ware, &c. Company* (a)—

Mr. *J. Pearson*, for the Official Liquidator, supported the application.

The MASTER of the ROLLS.

I think that this is an application I ought not to grant.

(a) 35 *Beav.* 52.

If I were to grant this application, then, in every case of a mortgage of a company's property, I ought, during its winding up, to allow a mortgagee to file a bill, and must also extend the like power to judgment creditors of the company. If I were to do so, the effect would be, that I should be putting the estate of the company to a considerable amount of expense, to enable the mortgagee to obtain an order, which I can make in Chambers. It is only necessary to know what the rights of the mortgagee are, and what is proper to be done, and then, on hearing the Official Liquidator, I might make the order without the necessity of any suit at all.

But if this application were granted, there would be a bill and answer; the case would be heard, and a decree made, directing accounts to be taken in Chambers apart from the winding up, and six months would be given to redeem, and then would come the ultimate order for foreclosure. This would probably take many months, while, if proper, I can make the order under the winding up to-morrow.

I am of opinion that the 87th clause was only intended to apply to cases where some difficult question arises, which can only be determined in a suit. But I consider that if a mortgagee comes in and asks for payment, I have full authority to deal with his rights. He may make an application in Chambers with respect to payment and the *interim* dealing with the property, on which occasion the opinion of the Official Liquidator will be very valuable. I can make no order.

1866.

In re
ST. CUTHBERT
LEAD
SMELTING
COMPANY.

1866.



PRINCE v. PRINCE.

Feb. 15.

The power given to a company, by the 41st section of "The Companies Act, 1856" (19 & 20 Vict. c. 47), to contract for land by a person acting under its express or implied authority, is not, as regards a company formed under that act taken away by the Companies Act of 1862 (25 & 26 Vict. c. 89) although it repeals the act of 1856; for it is a "right or privilege" preserved by the 206th section.

THE question raised in this case was as to the validity of a contract entered into between an intestate and a public company.

It appeared that a company, called "*The Manchester Royal Exchange Proprietors*," had been incorporated and registered as a company under the provisions of the Joint-Stock Companies Acts, 1856 and 1857 (19 & 20 Vict. c. 47, and 20 & 21 Vict. c. 14). By one of the rules of this company, the committee of management had power to purchase additional property for the purposes of the institution, the previous sanction of an annual or special general meeting of proprietors being obtained.

By the 41st section of the 19th & 20th Vict. c. 47, contracts on behalf of any company registered under that act, which, by law, are required to be in writing, may be made "by any person acting under the express or implied authority of the company."

These acts were, however, repealed by "The Companies Act, 1862" (25 & 26 Vict. c. 89, s. 205, and schedule 3). The repealing act does not, however, re-enact the 41st section of the former act, but enacts, by the 206th section, that "no repeal thereby enacted shall affect" (3) "Any *right or privilege* acquired or liability incurred under any act thereby repealed."

Such being the state of the law in 1864, this company became

became desirous of purchasing a freehold property in the city of *Manchester* belonging to the Rev. *Samuel Prince*, and on the 23rd of *December*, 1864, Mr. *Prince's* agent wrote to the committee of the company offering to sell them this property (describing it) for 22,000*l*, adding, "if it be accepted as to price, a formal contract will have to be prepared by Mr. *Prince's* solicitors and yours."

1866.
~
PRINCE
v.
PRINCE.

The committee, on the 29th of *December*, 1864, "resolved, that the offer of Mr. *Prince's* property for the sum of 22,000*l*. be accepted, subject to the approval of a general meeting of the proprietors."

On the 11th of *January*, 1865, a special general meeting of the company approved (as the Court held) of the contract, and authorized the committee to carry it into effect.

On the 9th of *February*, 1865, Mr. *Heelis*, the solicitor of the company, wrote to Mr. *Prince's* solicitor an answer to accept his offer, but Mr. *Heelis* had no authority, under the seal of the company, to accept the offer.

No formal contract had ever been prepared, and on the 22nd of *July*, 1865, before the contract had been completed, Mr. *Prince* died intestate.

Under these circumstances, the question was, whether a complete binding contract existed at the death of the intestate, so that, in equity, the purchase-money for the freehold property belonged to the next-of-kin and the property to the company.

The heir-at-law of the intestate, who was an infant, claimed the estate discharged of any contract.

c c 2

Mr.

1866.
PRINCE
v.
PRINCE.

Mr. *W. M. James* for the Plaintiffs, the widow and younger children of Mr. *Prince*. The offer contained in the letter of the 23rd of *December*, 1864, which was accepted unconditionally by the letter of the 9th of *February*, 1865, constituted a perfect binding contract between the parties, for they specify all the necessary terms. The reference to the preparation of a more formal contract does not destroy or invalidate this contract; *Gibbins v. The North Eastern, &c. District (a)*.

Mr. *Heelis* was a person acting under the "express or implied authority" of the company, and his written acceptance bound the company by virtue of the 41st section of the act of 1856, under which this company was incorporated. Although this act was repealed by the act of 1862, and the 41st section was not re-enacted, still the right of the company to contract by its agent was preserved by the 205th section, it being a "right or privilege" acquired under the repealed act.

Mr. *Birley* for the company.

Mr. *Little* for the infant heir-at-law. At the intestate's death there was no binding and subsisting contract for the sale of this freehold property, it therefore descended on his heir-at-law. *Heelis* was not appointed under the seal of the company and had no valid authority to bind the company and enter into this contract. The act of 1856 was altogether repealed by the act of 1862, but the legislature did not think fit to re-enact the 41st section of the former act. This case does not, therefore, come within the exception contained in the 205th section of the act of 1862, for the liability to be bound by the acts
of

of such an agent cannot be considered either a "right or privilege."

1866.

PRINCE
v.
PRINCE.

Again, the contract alleged was a mere negotiation and not final, for a further formal contract was stipulated for, and which would contain additional terms. *Heelis* was not the duly appointed agent of the company, and the sanction given by the general meeting was in too general terms and not sufficiently certain.

Wilson v. The West Hartlepool Railway Company (a) was referred to.

Mr. *W. M. James* in reply.

The MASTER of the ROLLS.

In this case, I am of opinion that a case has been made out for the specific performance of the contract. The first thing to be regarded is, what the contract consists in. Mr. *Prince*, by his agent, offers to sell this property to the company for 22,000*l.*, and the solicitor of the company on their behalf writes to accept it. If this had been a dealing between individuals, and not with a company, I should be of opinion that this would constitute a complete and binding contract. I do not think that the statement, that "a formal contract will have to be prepared," affects the question in the slightest degree; for when a contract is complete and certain in its terms it is binding, although a formal contract is intended to be prepared. I am, therefore, of opinion, in this case, that the terms are certain and that the correspondence constitutes a good contract as between individuals.

The

1866.

PRINCE
v.
PRINCE.

The second question is, whether this is a contract which is binding upon the company. It is necessary, in the first place, to consider whether it was binding under the 41st section of the act of 1856, under which the company was incorporated. I am of opinion that Mr. *Heelis* was, in fact, "a person acting under the express or implied authority of the company;" that *Heelis* laid Mr. *Prince's* offer before the committee, who resolved that the offer should be accepted, subject to the approval of the general meeting; that this offer was laid before the general meeting and that its acceptance was sanctioned by such general meeting, in compliance with the rules of the company. That being so, I am of opinion that the letter written by Mr. *Heelis* on the 9th of *February* constituted a complete contract under the act of 1856, and that the company became bound by his acts within the scope of his authority.

The next question is, whether this power to contract by an agent, given by the act of 1856, is taken away by the act of 1862. Except by statute, the company had no authority to constitute a person their agent for the purpose of purchasing land, unless they constituted him their agent for that purpose under their common seal; but the act of 1856 dispensed with this. The question therefore is, whether the act of 1862 destroyed this power. The 176th section provides for the application of that act to companies already formed, but it contains nothing disabling; on the contrary, it enables companies already constituted to obtain the benefit of that act. But the 205th clause in the act of 1862, which repeals the act of 1856, provides, that the repeal shall not affect "anything done under any acts thereby repealed," or "any right or privilege acquired or liability incurred under any act hereby repealed."

It is clear that the latter exception does not refer to things already done, because that is already provided for by the first; it must therefore mean "any right or privilege" subsisting.

1866.

PRINCE
v.
PRINCE.

The question is, whether the "right or privilege" given by the act of 1856, to enter into a contract by an agent, not so constituted by seal, is a "right or privilege" which the company enjoyed at the passing of the act of 1862. I am of opinion that it is, and that it was not taken away by the act of 1862.

A decree must therefore be made for the specific performance of this contract.

Re HAFOD LEAD MINING COMPANY.

Slater's Case.

Feb. 13, 20.

THIS was an application, made by the Official Liquidator, to put Mr. *Slater* on the list of contributories for 100 shares, on the ground that the transfer of them to Mr. *Casson* was fraudulent and void.

A company being in difficulties, *A. B.* gave *C. D.* 30*l.* to take a transfer of his shares, and the transfer, which stated (falsely) that *C. D.* had paid *A. B.* 25*l.* for the shares, was duly registered. About a year afterwards, the company was ordered to be wound up. *Held*, that *A. B.* was not a contributory.

The company was incorporated on the 15th of *November*, 1861, and Mr. *Slater* held 100 shares in it.

On the 29th *September*, 1863, the company was in difficulties, and information was given by the directors to the shareholders. Mr. *Slater* thereupon employed Mr. *Casson*, an accountant, and who owed him 25*l.* on bond, to see the books of the company, and he examined them accordingly.

On Distinction between a

transfer of shares which is fraudulent and void as against the transferee, and one which is so as regards the company.

1863.
 Re
 HANCOCK LEAS
 MINING CO.
 SLATER'S
 CASE.

On the 12th November, 1863, Mr. Slater gave Casson 25L to take his 100 share. Of this, 25L was paid by the debt then due from Casson to Slater, and the remainder was paid in cash. But the deed of transfer of that date falsely stated that Casson had given Slater 25L for the shares.

On the 27th November, 1863, the transfer of the shares was duly registered by the company in their books.

On the 5th November, 1864, being a year after this transaction, an order was made to wind up this company, and the Official Liquidator now applied to put Mr. Slater on the list of contributories for 100 shares, on the ground that the transfer to Casson, made when the company was in difficulties, was fraudulent and void. Mr. Casson, in his evidence, alleged that he had taken the shares under undue influence and pressure on the part of Slater, and under the fear of being sued by the latter on his bond, and that he was a mere trustee of the shares for Slater. It was also alleged that the shares had been transferred into Casson's name, in order to enable him to inspect the books of the company. All this was, however, denied by the Respondent, who insisted that the transfer was *bonâ fide*, and that Casson was to have the profit to be derived from these shares.

Mr. Selwyn and Mr. Roxburgh, for the Official Liquidator, cited *Lund's Case* (a); *Hyam's Case* (b); *Costello's Case* (c); *Bunn's Case* (d); *De Pass's Case* (e).

Mr. Southgate and Mr. Crossley, for Slater, cited *Fenwick's Case* (f); *Jessopp's Case* (g); *Strafford's Case* (h); *Budd's Case* (i).

(a) 27 Beav. 465.

(b) 1 De G., F. & J. 75.

(c) 2 Ibid. 302.

(d) Ibid. 275.

(e) 4 De G. & J. 559.

(f) 1 De G. & Sm. 557.

(g) 2 De G. & J. 638

(h) 1 De G., M. & G. 577.

(i) 30 Beav. 143, and 3 De G. & J. 300.

The MASTER of the ROLLS.

I have certainly held, that where a shareholder gets rid of shares by assigning them to a pauper, or to a servant over whom he has entire control, in order to avoid paying his share of the debts of the company and of throwing them on the other shareholders, this transaction is fraudulent and void, and I think the latter decisions tend to confirm that conclusion. But I do not consider that this precludes a shareholder from *bonâ fide* selling his shares to another person, or giving him money to take the shares, if the transaction be open and not merely colorable. Subject to an observation I am about to make, as to the statement of the consideration in the transfer, I see nothing in this transaction, which, as between Mr. *Slater* and the company, can justify me in saying that this transaction is colorable and void.

If a person holding shares in a joint stock company induces another person to buy them by making false representations to that person, the purchaser may come here to set aside the transaction as between them. But the company have nothing to do with that matter, and, subject to any power which they may possess of rejecting any transfers, they must adopt the decisions of the Courts as to the person who is to become or to remain a shareholder. The Court in such matters cannot look into the question of the fairness of the means by which such transfer was effected. If *A.* says to his servant, the company is about to be wound up, take my shares, they can get nothing from you, and will not attempt it, and I will repay you for the trouble and loss you may sustain, the company may properly say, this is no transfer, and that *A.* is still liable. But if *A.*, knowing that a company is on the eve of bankruptcy, says to *B.*, "this is a thriving and valuable company," and thereby induces

1866.

Re
HAFOD LEAD
MINING Co.
SLATER'S
CASE.
Feb. 19.

1866.

Re
HAFOD LEAD
MINING CO.
SALTER'S
CASE.

induces *B.* to buy them, *B.*, as regards the company, is the shareholder, until by a decree of the Court he has set aside the transaction and compelled *A.* to take back his shares. In the former case, the want of means of the servant or dependent of *A.* to pay calls is a material ingredient; in the latter case, the greater or less wealth of the transferee forms no element of consideration. The case before me, if all that is alleged against Mr. *Slater* be correct, and not disproved or denied by him, would make it belong to the second class of cases. *Casson* here puts his case upon this: that he took the shares upon undue influence and pressure on the part of *Slater*, and that he feared being sued by *Slater* on his bond. I have not been able to find any evidence to shew that *Casson* is not fully able to pay the calls on the shares; but with this the company have nothing to do. I assume that, if *Casson* pleased, he might, by bill in equity, set aside the transfer, and compel *Slater* to take back the shares; but until he has done so he is the shareholder, and to such a suit the company would not be proper parties. I have looked through the evidence, and I find that the case I have suggested is not really raised, and certainly not proved by the evidence. Whether *Casson* could maintain such a suit, when, according to a part of the evidence, he was induced to have the shares put in his name, in order to inspect the books, and whether, by so doing, he had ascertained the state of the affairs of the company, I do not stop to consider. This company has nothing to do with that case, but solely whether in this case the shares were collusively transferred to a man who could not pay calls, in order to relieve *Slater*, and this is not proved, and it is fit to observe, that one share, instead of 100, would have been quite as efficacious for the purpose of inspecting the books.

In

In the first place, *Casson* was competent to pay the calls. In the second place, the company, although in difficulties, was not wound up till nearly a year had elapsed. The mine might in that interval have proved profitable and valuable, and the shares, in that case, could not have been got back. In the third place, no indemnity was given to *Casson*, but it was expressly refused, and that refusal was not objected to and no indemnity was required.

1866.
Re
HAFOD LEAD
MINING CO.
SALTER'S
CASE.

The real difficulty in the case is, the false statement of the consideration, viz.: that 25*l.*, were paid for the shares by *Casson*, when, in fact, 30*l.* were paid to him. This is very serious, but I observe that *Casson* was employed to examine the books, and this examination, it is agreed on both sides, he made, and for which he now makes a claim. If this was taken into account and made to amount to 55*l.*, it would make the consideration paid 25*l.* But the whole matter is unexplained. This also is to be observed:—it does not appear to have been done for the purpose of deceiving the directors, for I do not find that they had any power of refusing to accept the transfer if the exact truth had been told.

I think, therefore, on the whole, that there is not such a case made out to set aside this transaction as to enable me to make any order on this summons; but the Respondent *Slater* does not come before the Court perfectly without taint, he did not put the real consideration in the deed as far as the evidence stands. If he did he certainly does not explain it. Therefore I must dismiss the summons without costs.

1866.

STOOKE v. STOOKE.

Mar. 12.

A testator gave a house and 300*l.* "of lawful money" to his daughter, and "the remainder of all his moneys, in whatever it may be, in bonds or consols or anything else," to his wife. *Held*, that the wife was entitled to all the testator's residuary personal estate invested in any security, including a life policy, but not to a leasehold or furniture or chattels.

THE testator, who had five children, died in 1864.

By his will, he gave to each of his three sons some house property, and to one of his daughters a house and 300*l.*, and then proceeded in the following words:—

"And I give to my daughter *Elenora Stooke*, the house occupied by Mr. *Lucas*, and if she dies without issue, then to come back to my sons, to be divided equally alike between the three, and I likewise give 300*l.* of lawful money of *Great Britain* to my daughter *Elenora*. *The remainder of all my moneys*, in whatever it may be, in bonds or consols or anything else, I give to my wife for her sole use, as long as she shall live, but not to give it away from my sons and daughters at her death, but to give it to either or divide it equally between the whole. I give to my two sons, *Charles* and *Richard*, the yard and garden what I bought of Mr. *Brewer's* executors, to be divided equally between them, but the part next to Mr. *Miller's* to be *Richard's*."

The testator was possessed of a leasehold called "*The Ivy Cottage*," held for a term if three persons should so long live, and he had effected a policy for 450*l.* payable on the death of the survivor of the *cestuis que vie*. There were also furniture, culinary articles, china, glass, wearing apparel, plate, wine and a pony carriage in and about *The Ivy Cottage*, of the estimated value of 141*l.*

The question in the cause was, whether this cottage
and

and the other articles passed under the words "the remainder of all my moneys."

1866.

STOOKE
v.
STOOKE.

Mr. *Baggallay* and Mr. *Rowcliffe*, for one of the next of kin, cited *Lowe v. Thomas* (a).

Mr. *Selwyn* and Mr. *Marten*, for the widow, cited *Montagu v. The Earl of Sandwich* (b); *Stocks v. Barrè* (c); *Rogers v. Thomas* (d); *Hinves v. Hinves* (e).

Mr. *Southgate* for all the Defendants except the widow.

The MASTER of the ROLLS.

It is very difficult to construe one will from the words used in another will; you must judge by the will itself.

I concur in this:—that if a testator, by his will, gives matters, which are not *money* in the ordinary acceptation of the term, and afterwards gives all "other my moneys whatsoever and wheresoever," he applies that expression to things which are not strictly *money* and consequently that things not of that character pass under the gift. Thus if a testator gives *Whiteacre* and all the rest of my money to *A. B.*, he means all his property, for he treats *Whiteacre* as "money," although land or real estate and personal chattels are not properly speaking "money."

Applying that rule to this case, I think that the meaning of the testator is not ambiguous. After giving a house and "300*l.* of lawful money of *Great Britain*

(a) 5 *De G., M. & G.* 315.

(b) 33 *Beav.* 324.

(c) *John.* 54.

(d) 2 *Keen*, 8.

(e) 3 *Hare*, 609.

1866.

Stooge
v.
Stooge.

Britain to his daughter *Elenora*," he gives the "remainder of all my moneys" to his wife. I am disposed to think, that if he had stopped there, and had said, "the remainder of all my moneys I give to my wife," it would have carried the whole of the property. But he specifies the moneys he means, by saying, "in whatever it may be, in bonds or consols or anything else." I read this as a gift of all his money on whatever security it may be, whether on bonds or consols or any other security, and all sums secured by any species of security. If he had had a freehold farm, that would not have been money in any sense of that word as used by the testator.

This view is confirmed by the fact, that after he had done this, he directs a yard and garden to be equally divided between his two sons *Charles* and *Richard*, from which it is clear, that he did not consider them as part of his money. This shews that the word is used in a restricted sense, and not in a sense which would include freeholds.

I am of opinion, therefore, that "money," as used in this will, includes money on any species of security.

I do not feel the difficulty as to the policy. The 450*l.* was secured by a policy of assurance for the purpose of repaying the value of the leasehold when it fell in upon the death of the last life. I do not see why the testator should not bequeath it, if he thought fit, for I think the leasehold and policy separate and distinct properties. Suppose he owed 1,000*l.*, payable by instalments, and had insured his life for 1,000*l.*, would it not be moneys on security? I think the 450*l.* was money invested in a policy.

I think

I think the widow is entitled to the policy, but not to the leaseholds or the furniture, &c., which go to the next-of-kin.

1866.

STOOKE
v.
STOOKE.

DECREE.

Declare that the bequest of "the remainder of all my moneys, in whatever it may be, in bonds or consols, or anything else," passed all the testator's residuary personal estate invested in any security, "including the policy of assurance," but not the leasehold premises called *Ivy cottage*, nor the furniture, &c., &c. therein, which were undisposed of.

In re THE ANGLO-GREEK STEAM NAVIGATION AND TRADING COMPANY LIMITED.

Mar. 6, 7,
8, 12.

THIS was a petition by two shareholders to wind up the company, which had been registered in *July*, 1865.

The words "just and equitable that the company should be wound up" in the 5th rule of the 79th section of "The Com-

By the memorandum of association the capital was stated

panies Act, 1862," are to be considered *ejusdem generis* with the four prior rules.

If it were established that a company never had any proper foundation, and that it was a mere fraud or bubble company, the Court would order it to be wound up.

Misconduct of directors and manager towards the shareholders, though a ground for relief by suit, is not, until such mismanagement has produced insolvency, a ground for winding up the company.

A large remuneration to the projector and directors of a company, if openly provided for by the articles of association, cannot afterwards be questioned by shareholders.

Observations as to the impropriety of directors receiving gifts from the projector out of the promotion moneys received by him from the company.

A benefit received by a director from persons employed by the company, or arising from the transactions of the company, cannot be supported.

It is not only the duty of directors of companies to be ready, at all times, to explain everything to shareholders, but also that they shall be engaged in no transactions connected with the company from which they can derive a profit which is not openly known to, and acquiesced in, by all the shareholders.

Every subscriber in a public company is bound to know the articles of association, and cannot complain of anything disclosed in them, which, if he does not know, he might and ought to know.

Shareholders, who appear to support or resist a petition to wind up a company, do so at their own cost, unless a personal charge is made against them; in which case, the director or member assailed is entitled to appear separately, and to his costs from the petitioner if the case fails.

Remarks on the impropriety of making the statutory affidavit, as to belief in the statements of a petition to wind up, without inquiry as to the truth of such statement.

1866.

In re
ANGLO-GREEK
NAVIGATION
AND TRADING
COMPANY
LIMITED.



stated to be 750,000*l.*, divided into 30,000 shares of 25*l.* each. The petition represented, in substance, that the company was a bubble company got up for the benefit merely of the projector and promoters, and it contained the following personal charges :—

The company was promoted by *Stefanos Xenos*, with the view and objects solely, as your Petitioners believe, of obtaining from the company a large sum of money for certain concessions, alleged to have been obtained by him, of the rights and goodwill of the *Greek and Oriental and the Levant and Black Sea Steam Navigation Company*, and a concession alleged to have been granted to him by the Greek government, granting to his vessels important privileges in Greek ports, which concessions your Petitioners believe had no actual existence.

With a view to carrying out the said scheme, the said *Stefanos Xenos* made an agreement with the following persons to become directors of the proposed company, that is to say, Rear Admiral *George Elliot*, Vice-Admiral Sir *Henry Keppell*, *H. H. Fox*, *Francis Tothill*, *George Saxon* and *Adam Schoules*, upon the terms that the said *Stefanos Xenos* should pay the sum of 3,000*l.* to Rear Admiral *Elliot*, 500*l.* to Mr. *Fox*, 300*l.* or 350*l.* to *George Saxon*, and other sums to the other directors out of the money which he should receive from the company for their assistance in carrying out his scheme.

Having made these arrangements, the said *Stefanos Xenos* and his co-promoters caused the articles of association of the company to be prepared and registered, and which articles contained the following among other clauses :—

“ Art. 14. The following shall be the first and present directors and officers. Directors : Rear Admiral *George Elliot*, Vice-Admiral Sir *H. Keppell*, *Stefanos Xenos*, Esq.,
H. H. Fox,

H. H. Fox, Esq., Francis Tothill, Esq., George Saxon, Esq., Adam Schoales, Esq.

1866.

In re
ANGLO-GREEK
NAVIGATION
AND TRADING
COMPANY
LIMITED.

" Art. 109. A sum of 3,000*l.* shall be set aside in each year for the remuneration of the directors, such sum to be divided amongst the directors in such proportions as they shall amongst themselves determine. Should the company pay a dividend of 25*l. per cent.* nett in any year, then a *bonus* of 10,000*l.* shall be in every such year divided amongst the directors, in such proportions as they shall amongst themselves determine.

" Art. 129. Mr. *Stefanos Xenos* shall for a period of three years, to be computed from the day of the date of the memorandum of association, be the managing director of the company, and his remuneration shall be 1,200*l.* a year ; but should the company pay a dividend of 10*l. per cent.*, then his remuneration shall be 1,500*l.* for every such year ; and if a dividend of 15*l. per cent.* or upwards be paid, then the remuneration to be 2,000*l.* for every such year.

" Art. 130. And whereas the said *Stefanos Xenos* has undertaken to sell to the said company two concessions : 1st, that of the rights and goodwill of the *Greek and Oriental and the Levant and Black Sea Steam Navigation Company* ; and 2ndly, a concession by the Greek government granting to his vessels important privileges in Greek ports, and has also undertaken to pay all the preliminary expenses incurred in the launching of the company, and to assign over to the company the lease of offices at No. 9, *Fenchurch Street*, with the furniture and effects therein, it is agreed, that in consideration of the foregoing he shall be paid the sum of 22,000*l.*, one-half in cash and the other half in shares, to be calculated at the rate of 16*l.* paid ; such shares, however, to rank

1866.

In re
 ANGO-GREEK
 NAVIGATION
 AND TRADING
 COMPANY
 LIMITED.

in point of money paid with the ordinary shares of ~~the~~ company, and the said *Stefanos Xenos* to be credited with the successive calls upon them up to the ~~said~~ amount of 16*l.* upon each share."

The petition then stated the issuing of the prospectus and that the Petitioners had taken shares, and proceeded to make the following statements:—

"That the directors had purchased certain ~~steam~~ vessels for 200,000*l.*, and paid for the same partly ~~by~~ bills of the company, and partly by 3,000 shares credited with 2*l.* 10*s.* per share as paid up, and that *Stefanos Xenos* had received from the vendors in that transaction a commission or bonus of 10,000*l.*

"That 987 only of the shares had been allotted to the general public, and 1,650 shares to Count *Metaxa*, being the only shares *bonâ fide* allotted, and your Petitioners believe, that not more than 10,000*l.* has been actually paid to the company in respect of the shares therein, and that the whole of the moneys so paid have been taken by *Stefanos Xenos*, on account of his alleged agreement with the company, and divided in certain proportions between himself and the other directors or some of them.

"Amongst others, there appear registered in the books of the company *Emmanuel Mavrogordato* for 900 shares and *Alexander Carnegie* for 600 shares each, credited with 2*l.* 10*s.* per share paid thereon, both of those persons being, in fact, nominees of the said *Stefanos Xenos*, who have made no payment whatever to the company on the said shares.

"It is utterly impracticable with the amount of *bonâ fide* subscribed capital of the company to carry on the business

Business thereof, and your Petitioners believe it never **was** the intention of the said *Stefanos Xenos* and his co-**P**romoters so to do, but to make the said company a **m**eans of their obtaining as much money as possible for **t**heir own purposes, and, when no more can be obtained, **t**o wind up the same.

1866.

In re
ANGLO-GREEK
NAVIGATION
AND TRADING
COMPANY
LIMITED.

" The directors and the said *Stefanos Xenos* are making **a** pretence of carrying on business by means of the said **s**hips, but your Petitioners believe that no real or *boná fide* business has been at any time done by the company, **n**or is there the slightest probability of its objects being **c**arried out.

" Your Petitioners believe that it is to the interest and **b**enefit of all the *boná fide* shareholders of the company, **w**ho have made any payment on their shares, that the **p**roceedings of the directors should be stopped and the **c**ompany wound up."

The petition was served on the company alone.

statements, but the effect of it is stated in the judgment **o**f the Court.

Mr. Selwyn, Mr. Roxburgh and Mr. Graham **H**astings in support of the petition.

Mr. Druce for Admiral Elliot.

Mr. Hemming for Mr. Carnegie.

Mr. Swanston for *Stefanos Xenos*.

Co Mr. Southgate and Mr. Cottrell for the Agency **o**mpany, who were holders of 5,120 shares.

D D 2

Mr.

1866.

In re
**ANGLO-GREEK
 NAVIGATION
 AND TRADING
 COMPANY
 LIMITED.**

Mr. *Homersham Cox* for Mr. *Mavrogordato*.

Mr. *Bagshawe* for shipbuilders.

Mr. *Roberts* for Count *Metaxa* and other shareholders.

Mr. *Selwyn* in reply.

The following authorities were cited:—" *The Companies Act, 1862*," 25 & 26 *Vict. c. 89, s. 79*; *Ex parte Spackman* (a); *Maxwell v. Port Tennant, &c. Co.* (b); *Re Marlborough Club Co.* (c); *Shaw v. Forrest* (d).

The MASTER of the ROLLS.

This is an application by two shareholders to wind up this company under the 79th section of the statute. There are five different rules laid down in this section defining under what circumstances a company may be wound up. First, whenever the company has passed a special resolution requiring the company to be wound up by the Court. Secondly, whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year: Thirdly, whenever the members are reduced in number to less than seven. Fourthly, whenever the company is unable to pay its debts. Fifthly, whenever the Court is of opinion that it is just and equitable that the company should be wound up.

Lord *Cottenham* laid down, and I and all the other Courts

(a) 1 *Mac. & Gor.* 170.

(b) 24 *Beav.* 495.

(c) 1 *Law Rep. Eq.* 216.

(d) 20 *Beav.* 249.

Courts have followed him, that these words in the fifth rule are to be considered words *ejusdem generis*, and that they must relate to the four subject matters previously stated in the four previous rules. At the same time, if it were established that the company never had a proper foundation, and that it was a mere fraud, or what is commonly called a "bubble company." The Court would consider that it came within that fifth rule.

1866.

In re
ANGLO-GREEK
NAVIGATION
AND TRADING
COMPANY
LIMITED.

In this case, as none of the first four rules apply, it becomes necessary to examine into the constitution of the company to see whether there was anything which, under the fifth rule, would induce this Court to wind up this company. For this purpose, I have read and carefully considered the affidavits and the evidence of the witnesses given in Court, and, as far as the evidence allows me to judge, coupled with my very limited knowledge of the subject itself, I should judge favorably of the plan of this association, provided it were carried on in a *bona fide* manner with ready money, and not with money scraped together by large discounts and mulcted by heavy commissions.

The concessions, as far as I am able to judge from the evidence, appear to me to be valuable, the support of the Greek houses seems to me to be secured, the first voyages appear to me to have been prosperous and to have produced fair and reasonable profits and to forbode future prosperity, and the whole association might, I think, reasonably expect that fair and reasonable profits would be made by the contributories, if the assets of the company are not wasted by too heavy remunerations to the officers, by payments for loans or *quasi* loans and for obtaining shareholders.

Having

1866.

~
In re
ANGLO-GREEK
NAVIGATION
AND TRADING
COMPANY
LIMITED.

Having come to that conclusion, if this matter had rested there, the task I should have had to perform would have been very simple. I should in fact simply have dismissed the petition. But the petition goes on to attack several of the members of the concern and the directors themselves personally. If this had been simply denied by the company, and if they themselves had not personally appeared, I should have simply dismissed the petition, no case having been made out for the winding up the company. For, as I stated in the course of the argument, the misconduct of the directors, though it may be a reason why the shareholders should have relief against them, is not a reason for winding up the company. But the directors and other shareholders have appeared personally, and the affidavits and the cross-examinations have disclosed matters of great importance to the shareholders which much concern the interests of this association and which involves the question arising upon the fifth rule, which I have read. Their appearance and asking for costs have compelled me to go into the question, for without this I should not have been disposed to have done so, but I should simply have considered, as I have stated, that no case for winding-up was made. For this purpose, I have gone through the evidence and cross-examinations and the affidavits.

It is, as I have often said, the duty of all directors to be not only ready at all times to explain everything to the shareholders, but it is also their imperative duty to take care that there should be nothing of the character of underhand dealing between them, by which I mean, that there should be no transaction connected with the company by which profits can be derived by them or any one of them, which is not openly known to and acquiesced in by all the shareholders.

But

But every subscriber is, in my opinion, bound to know the articles of association, and he cannot complain of anything disclosed by them, which, if he does not know, he might know and which he ought to know. Now, in this case, by sections 129 and 130 of the articles of association, it is provided, that Mr. *Stefanos Xenos* shall, &c. [see *ante*, p. 401.]

1866.

In re
ANGLO-GREEK
NAVIGATION
AND TRADING
COMPANY
LIMITED.

Now I see no reason to complain of those clauses; for aught I know, they may be valuable concessions, and I think the evidence has established that both concessions were obtained by *Stefanos Xenos*' exertions, and assuming, as I assume the fact to be, that *Stefanos Xenos* possessed the requisite knowledge, and that he gave the whole of his time to the concern, the remuneration does not appear to me to be excessive, and, above all, it is openly told to all the shareholders.

Then, by clause 109, a remuneration to the directors is given in addition to this managing director, amounting to 3,000*l.* a year between them. It runs thus:— [see *ante*, p. 401]. This is all fair and open, and if the public think fit to subscribe to companies, conducted on such terms by persons receiving such a remuneration, it is their affair, and they cannot afterwards complain. They knew, at the time they did so, that 4,200*l.* was to be deducted out of the nett profits before any dividend was to be paid.

But the evidence before me discloses a further state of things, which was not disclosed by the articles of association, and which had not previously been made public. In the first place, Admiral *Elliott* was to receive 3,000*l.* from the promoter, and he has actually received it in paid-up shares, given to him by Mr. *Stefanos Xenos* as the reward of his assistance in getting

1866.

In re
ANGLO-GREEK
NAVIGATION
AND TRADING
COMPANY
LIMITED.

getting up the company, and for lending his name and services. He has also received 750*l.* in cash from *Stefanos Xenos*, which is said to have been for money spent and for the time he bestowed in the service of the company, and for the knowledge he possesses in nautical matters, which made his services very valuable, and all this is above his remuneration for what he had done. This may have been a very proper payment in itself, but the evil is, that it was not divulged to the public, who are asked to become shareholders, and it is not a fit matter as between directors themselves. In truth, the shareholders were not injured by Mr. *Stefanos Xenos* giving to Admiral *Elliott*, the chairman, 3,000*l.* of his own money and out of his own paid-up shares, rather than to any stranger, which he might have done. That is, they were not injured by the payment of that money, but the concealment that the care and superintendence of the interests of the association were only to be procured by such means makes it a different and serious matter.

Again, 300*l.* was paid to Mr. *Saxon*, another director in the company, this was also paid by Mr. *Stefanos Xenos*; but if Mr. *Stefanos Xenos* could afford to pay those sums out of moneys paid to him by the company for the concessions which he had made over to them, and which it is proved were paid out of money that he had got from the company, then it was the company and not the directors who ought to have obtained the benefit. They gave a larger price for the concessions than Mr. *Stefanos Xenos* required, and the surplus was applied in bribing persons to lend their names, whom the public supposed to be induced to join the company solely from their confidence in the success of the undertaking. As between shareholders, these transactions would have been nothing, but, as between directors,

it

It becomes everything. The public has a right to expect that the directors, who have lent their names to an institution of this character, have carefully considered the chances of success of the scheme which has been announced to the public, and that they have, after much consideration, sanctioned it as favorable. The public rely on their names, they rely on the knowledge they possess, and judgment and capacity of the gentlemen who have become directors. But where the directors obtain large pecuniary interest in, or large pecuniary advantages out of, the concern, not mentioned to the public, it is impossible for the public to distinguish between the motives which have induced those gentlemen to support this scheme, or to ascertain how far they may depend upon the directors' belief in its chance of success, and that advantage which is common to all persons who are shareholders, as distinguished from that particular advantage or benefit derived personally by the directors themselves, which is not shared in by any of the members of the association.

Again, as regards *Stefanos Xenos*, another and one of the most important of the directors, the evidence discloses a matter which the Court cannot look upon favourably. The project was one which peculiarly required a large amount of ready money to be employed; many steamers were required and must be paid for in order to establish the association, and it appears that contracts were entered into for the purchase of five or six steamers for 100,000*l.* These contracts, as far as I can judge, were very properly entered into with certain ship-builders by *Stefanos Xenos*' brother, *Aristides Xenos*; but a part of the arrangement was, that the brother was to have a profit of 10*l. per cent.* upon the transaction; that he was to receive 10,000*l.* from the builders, in consideration of their being employed to build

1866.

~ ~ ~
In re
ANGLO-GREEK
NAVIGATION
AND TRADING
COMPANY
LIMITED.

1866.

In re
ANGLO-GREEK
NAVIGATION
AND TRADING
COMPANY
LIMITED.

build steamers to the amount of 100,000*l.*, and *Stefano Xenos* admits that he was to share in that profit.

That is a transaction which cannot be supported upon any grounds. It is unnecessary for me to refer to this subject more in detail. I have often had occasion at great length to detail the principle that governs cases of this description. In the case of *The York and North Midland Railway Company v. Hudson (a)*, I did not allow Mr. *Hudson*, one of the directors, who had bought iron for himself and re-sold it to the company at the market price after it had risen in value, to retain the profit by the re-sale to the company. Upon all these occasions, the directors are bound to do the best they can for the company, for the persons who are their *cestui que trust*, and no director can make a profit out of the affairs of the company, except such profit is acknowledged, admitted and established by the rules of the association.

To conduct this company successfully large calls ought to have been made on the shareholders, in order to enable the directors to conduct the business with any reasonable chance of success. But how was this money obtained? The *Railway Finance Company* took 400 shares upon these terms:—that they were to be allowed a profit of 10*l. per cent.* upon the amount of the calls; in other words, they were to pay nine-tenths for what every other shareholder was to pay ten-tenths; and they were to receive the same profit as every other shareholder. This 10*l. per cent.* was paid in advance, and all the calls were to be made as if they had been paid up in full; and accordingly, upon payment of 10,000*l.* by the railway company, they were to be treated as having paid 20,000*l.*

(a) Reported on another point, 16 *Beav.* 485.

20,000*l.*, that is to say, having paid up in full the first call, which was to be made in advance. In addition to this, a commission of 2,000*l.* is given to the *Imperial Finance Company* for negotiating the taking of shares and for the advance of money made to this association.

1866.

~
In re
ANGLO-GREEK
NAVIGATION
AND TRADING
COMPANY
LIMITED.

I repeat that, in my opinion, there was a fair prospect of success under a proper and economical management; but if this system is to be pursued, it requires but very little prophetic power to foresee that this company will soon appear before this Court in a condition when the order, which I am now about to refuse to make, will become inevitable. All this I have referred to for this purpose only:—with reference to the fifth rule, and for the purpose of considering whether this company is in such a situation that the Court ought to wind it up, for all this is urged as a ground for an immediate order for winding up the company. I repeat again, that I do not so consider it. I am of opinion that the misconduct of the directors and manager towards the shareholders may be the subject of a suit, but that it is not a reason for winding up the company until that mismanagement has produced insolvency, which is very far from being the case now. There are no debts except that to the ship-builders, and some others which seem to be very small.

Assuming that a bill would lie to correct all these matters which I have mentioned, and assuming that the directors could be compelled to restore, for the benefit of the company, the moneys they have received, and that the shares of the *Railway Finance Company* ought to be cancelled, or some alteration made in that respect, still I am of opinion that is a matter for a suit, and not for a petition for winding up; and that there is no ground at present for obtaining an order which

1866.

In re
ANGLO GREEK
NAVIGATION
AND TRADING
COMPANY
LIMITED.

which might be made in the course of the suit to which I have referred. I see much that may be proper to reform, but I see nothing which, to use the words of the act, would render it "just and equitable," in the present state of affairs, that the company should be wound up; nor should I, as indeed I stated originally, have gone into this matter so much in detail, but for the appearance of the several Respondents to meet the charges made against them in the petition. The petition must, therefore, be dismissed as regards the company, and must be dismissed with costs.

But I have now to consider the costs of the various persons who have appeared as Respondents upon this petition, some of the facts relating to whom I have already referred to. The rule I have always followed has been this:—if shareholders appear to support or to resist a petition for winding up a company, they do so at their own cost. But if a personal charge is made against any of the directors or against any member of the company in the petition, then the director or the member of the company so assailed is entitled to appear separately, and if the case against him fails, the Petitioner must pay the costs. That is the general rule which I have made and have always followed:—that the Petitioner, having made such a charge and failed, must pay the costs.

I will now proceed to enumerate the various Respondents who appear, and consider their cases *seriatim*. Mr. *Roberts* appears for shareholders having 2,030 shares who support the petition. Among those for whom he appears is Count *Metaxa*, in respect to whom it is not necessary that I should make any observation further than this:—that it appears to be principally his petition, and that it has been got up at his instance.

instance. The Petitioners do not ask for costs, and could not, if they did, obtain them.

1866.

In re
ANGLO-GREEK
NAVIGATION
AND TRADING
COMPANY
LIMITED.

The others who appear to oppose the petition are:—first, Mr. *Hemming*, who appears for Mr. *Carnegie*; Mr. *Druce*, for the chairman Admiral *Elliot*; Mr. *Southgate*, who appears for the holders of 5,120 shares (the *Imperial Agency* 975, the chairman of that company 25, the *Railway Finance Company* 4,000, and Mr. *Fox* 120); then Mr. *Homersham Cox* appears for Mr. *Mavrogordato*; Mr. *Bagshawe* appears for the builders of the boats, and last in order of argument, but one of the most important, is Mr. *Stefanos Xenos*, who appears by Mr. *Swanston*.

The first is Mr. *Carnegie*, and the charge against him is contained in the 15th paragraph of the petition, and it is this:—"Amongst others, there appear registered in the books of the company *Emanuel Muvrogordato* for 900 shares and *Alexander Carnegie* for 600 shares, each credited with 2*l.* 10*s.* per share paid thereon, both of those persons being, in fact, nominees of the said *Stefanos Xenos*, who have made no payment whatever to the company on the said shares." Now this is not a very serious charge against Mr. *Carnegie*, but such as it is, it was sufficient, in my opinion, to justify Mr. *Carnegie* in appearing to contradict it. He has established that it was wholly without foundation, and in my opinion, he is entitled to his costs of this petition, but his costs should be confined to his defence of this charge.

Admiral *Elliot* is the next, and the charges against him are these:—the 4th and 5th paragraph of the petition must be read together: "4. The company was promoted by *Stefanos Xenos*, with the view and objects solely, as your Petitioners believe, of obtaining from the company

1868.



In re

ANGLO-GREEK
NAVIGATION
AND TRADING
COMPANY
LIMITED.

company a large sum of money for concessions alleged to have been obtained by him, &c." [see *ante*, p. 400.]

I am of opinion that the 4th paragraph is disproved, that is to say, it was not a mere fraudulent scheme and the concessions had an actual existence, and it would therefore follow that the charge of collusion is disproved. If it had rested there, I should certainly have given Admiral *Elliot* his costs: but the fact of the contract for the payment of 3,000*l.*, which was not known to the shareholders, and the further payment of 750*l.*, are proved, and I regret to say, that I cannot, in such case, where there has not been perfect openness to the shareholders, upon a transaction of so much importance and certainly very fit to be inquired into, give him his costs.

It is also to be observed, that no access was given to the Petitioners to any of the books of the company, by which they seek to support these charges. It is said that this discovery was only sought for the purpose of making charges and for the purpose of endeavouring to support this petition. Now, undoubtedly, this is very likely to be true, but there ought to be nothing to be concealed in the books, nothing which cannot be made public, and nothing which the shareholders could find fault with. Concealment always does harm, and if the Petitioners had had the whole of the books and papers laid open to them, they might, possibly, never have presented this petition or carried on these proceedings. But whether this be so or not, if the charges made by them had been retained in the petition after full inspection of the books of the company, it would have been a much more serious matter, and would have been visited by me much more severely. If the allegation that the concessions had no actual existence and that this was a scheme to put money into the pocket of *Mr. Stefanos Xenos*

had been omitted, the rest of the 5th paragraph had been a sufficient charge. I cannot therefore charge Admiral *Elliot* his costs of this petition.

1866.

In re
ANGLO-GREEK
NAVIGATION
AND TRADING
COMPANY
LIMITED.

Against the *Railway Finance Company*, the *Imperial
Company* and Mr. *Jencken* there is no charge ever made by the petition, and I think, therefore, they were not justified in appearing. It is true, that in one of the affidavits, a charge is made respecting the *Imperial Finance Company* to the effect that it was a private company, which, in my opinion, has been wholly disproved, as far as there is evidence before me; but they appeared before this charge was made, and they only appeared of it because they made themselves Respondents in the petition. This besides was another and a collateral issue, which it would be impossible for me to investigate, and one which is wholly immaterial as respects the order asked by this petition to wind up the *Anglo-Greek Company*.

The charge against Mr. *Fox* is of a very different character. He is charged with having received 500*l*.

Mr. *Stefanos Xenos* for supporting his scheme, which is disproved, and, in my opinion, he must have borne the costs. This was a charge of a serious character, which entitled him to appear and resist. As, however,

he has appeared in company with three others, I cannot give him more than his share of the costs. I do not mean to give him the whole cost, but his share, in the same way as he would bear them if no costs had been given.

The charge against Mr. *Mavrogordato* I have read; that he had 900 shares, each credited with 2*l*. 10*s*. per share paid thereon, when, in fact, he was the nominee of *Stefanos Xenos*, and had made no payment

1866.

In re
ANGLO GREEK
NAVIGATION
AND TRADING
COMPANY
LIMITED.

ment whatever on those shares. This turns out to be correct literally, but not substantially. It is true nothing has been paid on those shares, but that is explained, by the fact that the company were indebted to him as their agent, and employed him for various purposes in the *Levant*, for which they would have had to pay him. I do not think that would entitle him to a separate appearance, his defence would have been involved in that of the company, whose agent he was.

The case of Mr. *Carnegie* is different, because not only he was not one of the directors of the company or connected with it as agent in any way, except as a shareholder, but there was not a semblance of truth in his case, which is not the case with respect to *Mavrogordato*, and I am of opinion I can give no costs to Mr. *Mavrogordato*.

No charge whatever is made by the Petitioners against the builders of the boats, and they appear to support the company *simpliciter*. They must, therefore, pay their own costs.

With respect to Mr. *Stefanos Xenos*, the charge is unquestionably of a very serious nature. The charge is:—that Mr. *Stefanos Xenos* promoted the company “with the view and object solely, as they believe, of obtaining from the company a large sum of money” for certain alleged concessions, “which concessions the Petitioners believe had no actual existence.”

I am of opinion, that the contrary is distinctly proved, and that he had concessions from the Greek government, giving privileges in Greek ports, and that he had a concession from the Greek merchants for their support. He produced the document in Court.

Now

Now this is so serious and so direct a charge of fraud, that I hesitated for a very long time whether I should not allow him his costs of meeting that charge, which, in my opinion, is wholly disproved; but then the facts which have been established of the agreements with the shipbuilders, the payments to Admiral *Elliot* and Mr. *Saxon*, none of which facts were disclosed to the public, and the withholding of all information from the Petitioners, have compelled me to say, that to entitle any directors, and, above all, a managing director, to his costs in such a case, he must appear unsullied by any transaction he has entered into, and be able to shew that he obtained no benefit at all from any of those matters, unless it has been openly disclosed to the public. I cannot, therefore, with propriety, give any costs to Mr. *Stefanos Xenos*.

1866.

In re
ANGLO-GREEK
NAVIGATION
AND TRADING
COMPANY
LIMITED.

I wish I could now part with this case, with which I have little further to do, except to express dissatisfaction with almost everybody, and with all the proceedings from beginning to end, but I must still make some observations for the purpose of expressing my dissatisfaction at the mode in which the petition has been got up, and in which it has been launched in the first instance, and my regret that a gentleman, in the position of the Petitioner, should have thought he had sufficiently discharged his duty by making an affidavit of his belief of the truth of the contents of the petition, which he had never read, and the statements in which he took entirely upon trust, statements of his solicitor which he was wholly ignorant of, and which he had neither read himself nor had heard read to him. In truth, he seems to have acted for another throughout the whole of this matter, to have been very indifferent upon the subject, and to have treated it as an ordinary matter, in regard to which he was to do whatever he was told. In my

1866.

In re
ANGLO-GREEK
NAVIGATION
AND TRADING
COMPANY
LIMITED.

opinion, that is not justifiable, and no care can be too great, where an oath is to be made of belief in the statements mentioned in a document, in ascertaining their truth. I have no doubt he was ready and willing to believe everything that was told him, still, in my opinion, he ought to have ascertained it carefully and fully. In my opinion, also, the solicitor who appeared for him ought not to have allowed his client to make such an affidavit, without having first taken care that his client well knew all that was stated in the petition itself, and without also informing his client why he called on him to say he believed the truth of the facts narrated by the solicitor, of which he, the client, was not personally aware.

The final result of the whole is, that the petition is dismissed with costs against the company, Mr. *Carnegie*, and Mr. *Fox*, but without costs as regards all the other Respondents.

NOTE.—Subsequently, a judgment for a very large amount was obtained against the company, which, remaining unsatisfied, the Court, on the 28th of *May*, 1866, ordered this company to be wound up.

1866.

**Re THE ANGLO-GREEK STEAM NAVIGATION
AND TRADING COMPANY (LIMITED).**

(No. 2.)

May 3.

A PETITION being dismissed with costs (a), the Petitioners neglected to file the petition, and, upon an application being made to them, they said that it was lost.

Petitioners neglected to file the petition and had lost it. On the application of the Respondents, liberty was given to file a copy, and the Petitioners were ordered to pay the costs of the application.

Mr. *Jessel*, for the Respondents, applied for leave to file a copy of the petition, and that the Petitioners might pay the costs of the application.

Mr. *Roberts*, *contra*, said that the application to the Court was unnecessary, as the Petitioners would have consented to the order.

The MASTER of the ROLLS.

I must give the Respondents liberty to file a copy of the petition, and the Petitioners must pay the costs of the application. That is the proper form of order; I have made such orders before (b).

The Petitioners have lost the petition, and have obliged the Respondents to make this application to the Court. The Petitioners, who have caused the necessity of the application, must pay the costs of it.

(a) *Ante*, p. 418.

& *Cr.* 360; *Re Devonshire*, 32

(b) *Andrews v. Wallon*, 1 *Myl.* *Beav.* 241.

1866.

Mar. 12.

Apr. 17.

By a will, the residue was given to seven persons as tenants in common for life, and on the death of the survivor was to be divided amongst their children then living *per stirpes*.

By a codicil, the gift to the children was revoked, and the residue was to be divided "from and after the several deceases" of the seven, "and after the decease of the survivor of them," amongst their children *per capita*.—*Held*, that the words "from and after," &c., were to be read disjunctively, and that, on the death of any of the seven, one-seventh was divisible amongst children of the seven *per capita*.

By his will, the testator gave his residue amongst his nephews and nieces, excluding "John" Shutt. By a codicil, he varied the limitation to this class, and excluded "William" Shutt "as in his said will was directed." *Held*, that the exclusion was void for uncertainty, and that they both took a share.

COPE v. HENSHAW.

THE testator, by his will dated in 1838, devised and bequeathed his real and personal estate to trustees in trust to convert and invest and pay the income to his wife for life, and he proceeded as follows :—

"And from and after her decease, upon trust to pay the interest and dividends of the said trust moneys, stocks, funds and securities unto and equally between my brothers and sisters following, that is to say, *John Worsey, Nathaniel Worsey, Ann the wife of Joseph Day, Mary the wife of William Shutt, Sarah the wife of Thomas Cope, Ellen the wife of William Worsey, and Elizabeth the wife of Joseph Eccles*, for and during their several and respective lives in equal shares and proportions; and from and after their deceases and the decease of the survivor of them, upon trust to pay and divide the said trust moneys, stocks, funds and securities unto and between all and every the children and child of my said brothers and sisters who shall be living at the decease of the survivor of them my said brothers and sisters, and the issue of such children or child as shall be then dead, in manner hereinafter mentioned, that is to say, that on the decease of the survivor of my said brothers and sisters, the said trust moneys, stocks, funds and securities shall be divided into seven equal shares, and the children or child of each one of my said brothers and sisters shall have and be entitled to one-seventh share of the said trust moneys equally to be divided

divided between them, it being my intention that the children and issue of my said brothers and sisters shall take *per stirpes*, and not *per capita*. Provided nevertheless, and I do hereby direct, that my nephew *John Shutt* and my niece *Sophia Shutt* be excluded from any benefit arising from or any participations in the said trust moneys, stocks, funds and securities, either as children of my sister, taking under the before-mentioned bequest, or from any interest they may become entitled to by accruer or survivorship."

1866.

 COPE
 v.
 HENSHAW.

On the 22nd of *May*, 1840, the testator made a codicil to his will, by which, after reciting that by his said will he had given and bequeathed the residue of his trust moneys and estate, after certain events therein named, unto and equally between the children of his brothers and sisters, &c., &c., he proceeded in the following words:—

"Now I do hereby revoke this bequest, and do direct my trustees hereinafter named to divide the said residue of my trust moneys and personal estate, from and after the several deceases of my brothers and sisters, to whom the interest is bequeathed for their respective lives by my said will, and after the decease of the survivor of them, unto and equally between the children of my said brothers and sisters, namely, *John Worsey*, *Nathaniel Worsey*, *Ann* the wife of *Joseph Day*, *Mary* the wife of *William Shutt*, *Sarah* the wife of *Thomas Cope*, *Ellen* the wife of *William Worsey*, and *Elizabeth* the wife of *Joseph Eccles*, in equal shares and proportions, excluding nevertheless thereout, as in my said will is directed, my nephew *William Shutt* and my niece *Sophia Shutt*, it being my will and intention each child of any brother or sister should take an equal share with the others, and not their parent's share, as directed by my said will; and it is my will and intention that the husband of any one
of

1866. of my said sisters, who shall survive his wife, shall be
entitled to her share for his life."

Cope
v.

HYSBRAW. The testator died in 1846, and his widow in 1852 —

Nathaniel Worsey, who was the survivor of the brothers and sisters, died in 1861, and there were forty-four nephews and nieces living at his death.

Thomas Cope and *William Worsey*, the husbands of two of the testator's sisters, survived their wives.

Ellen the wife of *William Worsey* died in 1839, between the dates of the will and the codicil.

The following four questions arose on this will and codicil :—First. Whether the estate of the testator was to be divided into seven-sevenths, one of which was to be distributed on the respective deaths of each of the testator's brothers and sisters, or whether it was a gift in joint tenancy amongst them, so that no distribution was to take place until the death of the survivor.

Secondly. Whether the class to take was limited to those who survived the survivor of the brothers and sisters, or whether all the children of the brothers and sisters took vested interests on their births.

Thirdly. Whether *William Worsey*, the last surviving husband of the sister of the testator, took the whole property during his life ; or, if not, whether he took any and what portion of it.

And fourthly. Whether the nephews *John Shutt* and *William Shutt*, or either of them, were or was excluded from taking any benefit under this will and codicil.

Mr.

Mr. *Selwyn* and Mr. *Chapman Barber* for the Plaintiffs, the trustees, stated the case, and in regard to the question of uncertainty referred to *Drake v. Drake* (a).

1866.

COPE
v.
HENSLOW.

Mr. *Baggallay* and Mr. *Rendall* for children, argued that on the death of any of the tenants for life his share became divisible amongst the class.

Mr. *Hobhouse* and Mr. *Cracknall*, for the husband who survived his wife, argued that the husband was placed in the same situation as the deceased wife, and that as the fund was not divisible until the death of the surviving brother or sister, the income, until that event, was divisible amongst the brothers and sisters then living, either under an implied gift or in right of survivorship incident to a joint tenancy. That the husband was entitled to a share in the whole income; *Hawkins on Wills* (b); *Jarman on Wills* (c); *Armstrong v. Eldridge* (d); *Tuckerman v. Jefferies* (e); *Pearce v. Edmeades* (f); *Cranswick v. Pearson* (g).

Mr. *Bird* for *John Shutt*. In the direction for the exclusion contained in the codicil, the words "as directed by my said will" have reference not to the person but to the manner of exclusion, and *William* is substituted for *John*. Instead of repeating the long proviso in the will, the testator effects his object by a reference.

Mr. *Rowcliffe*, for other parties, observed that the gift to the "issue" of deceased children had not been revoked by the codicil.

The

(a) 25 *Beav.* 641, and 8 *H. of L. Cas.* 172.
(b) *Pages* 269, 245.
(c) *Ch. xvii.* p. 476 (1st edit.)

(d) 3 *Bro. C. C.* 215.
(e) 3 *Bac. Ab.* 681.
(f) 3 *Y. & Coll.* 246.
(g) 31 *Beav.* 624.

1866.

CORE

v.

HENSHAW.

Apr. 17.

The MASTER of the ROLLS, after stating the will and the four questions, said,—

On this there is no doubt, that, under the will alone, those children alone who survived the last tenant for life take, and they take *per stirpes*, and that *John Shutt* is excluded and that the husbands of the daughters take nothing.

The codicil raises all the four questions. Now it is to be observed that, by the codicil, the testator revokes the former bequest to the children, and consequently, the will can only be referred to for the purpose of shewing in what sense the testator used particular expressions which he employed in the codicil.

I think the words “after the several deceases of my brothers and sisters,” &c. and “after the deceases of the survivors of them” must be read disjunctively, and that each share is divisible, on the death of the tenant for life of that share, amongst the persons then entitled. The previous gift in the will gives the brothers and sisters separate estates or one-seventh each as tenants in common; this codicil makes each one-seventh share divisible on the death of the tenant of that particular share. I read the will and codicil together, exactly as I should do the will alone, if the whole of the gift that follows the words “in equal shares and proportions” in the will had been expunged and the words in the codicil substituted for them, excepting the passage relating to *John Shutt* in the will and that relating to *William Shutt* in the codicil. So reading it, it appears to me to be clear that each share is divisible upon the death of the tenant for life of that share.

The consequence that follows from this is, that every child,

child, or, in other words, every nephew and niece, on its birth, took a vested interest, and that the class of takers of each share is ascertained on the death of the tenant for life of that share, all of whom take *per capita*.

1866.

COPE
v.
HENSLOW.

Not only does this appear to me to be the plain meaning of the words, but there is another circumstance which leads me to a confirmation of this conclusion, which is this:—that one of the testator's sisters, Mrs. *William Worsey*, died in the interval between the will and the codicil. The testator must have known this, and he hereupon introduces a direction that the husband who should survive his wife should be entitled to her share for life. That seems to me to be a direction that *William Worsey*, whose wife was already dead when the codicil was executed, should take, for his life, the one-seventh share which his wife would have taken had she survived the testator. The period of distribution of this share, therefore, is postponed till the decease of *William Worsey*, but the period of distribution of each of the other shares is on the death of each brother or sister.

The contention that the brothers and sisters took as joint tenants, or rather that the share of each one that died survived to the other, is not, in my opinion, capable of being supported; it is contrary to the express words of the will and codicil, and is contrary to the scope and object of them as forming one testamentary instrument.

I think that the words of the codicil respecting *William Shutt* annul the meaning of the will respecting *John Shutt*, and that the words "excluding nevertheless hereout as in my will is directed my nephew *William Shutt*," renders the whole void for uncertainty.

I will accordingly make the declaration following:—
As to the first question, I declare that the estate of the
testator

1895.
 ~~~~~  
 Case  
 v.  
 Estate of

ESTATE is to be divided into seven-sevenths, one-seventh of which is to be distributed on the death of *William Worsey*, and the other six-sevenths on the respective deaths of each brother and sister of the testator, and when the distribution takes place between all the children of all the brothers and sisters then alive and the legal personal representatives of each of such children as have died since the death of the testator, such children and representatives taking *per capita*; that is, the representatives only taking the share which the child they represent would have taken if living.

As to the second question, which is involved in the first, the declaration will be, that there is no survivorship between the tenants for life of the various shares.

As to the third question, the declaration will be, that *William Worsey* takes one-seventh for his life, and that on his decease that one-seventh will be distributed amongst all the children of the deceased brothers and sisters then alive and the legal personal representatives of such of them as may be then dead since the death of the testator, such children taking *per capita* and the representatives the share which the deceased child would have taken if living.

As to the fourth, that the directions respecting *John* and *William Skutt* are void for uncertainty, and that they both take vested interests in reversion in the shares so given to the brothers and sisters and to *William Worsey* for their respective lives.

---

1866.

BOVILL *v.* GOODIER.Feb. 19, 20, 21,  
22, 23, 26.  
Apr. 18.

**T**HE object of this suit was to restrain the infringement of a patent, and to recover the amount of profits made by the use of it.

On the 5th of *June*, 1849, the Plaintiff obtained letters-patent for certain improvements for the manufacture of wheat and other grain into meal and flour. These improvements are detailed in the specification [*post*, p. 431]; but the substantial object of the invention was, to get rid of the clamminess or pastyness of the meal caused by the heat produced by the friction in grinding; and, secondly, to separate the dust or stive in the air drawn through the surfaces of the millstones, which affected the cleanliness of the mill and the health of the workmen, and also occasioned the loss of the small particles of flour.

The Plaintiff had been engaged in extensive litigation in the defence of his patent. In *July*, 1856, he had brought an action against *Keyworth* for an infringement of it, and had obtained a verdict. In this action (*Bovill v. Keyworth*) Lord *Campbell* had certified that the validity of the patent had come in question and was

The distinction in equity is, that where the validity of a patent has not been the subject of any legal proceedings, the patentee must prove its validity at law, before the Court of Equity will protect him; but having once established its validity, then the Court of Equity will protect him against any other person until that person proves its invalidity.

A patentee established the validity of his patent in an action against *A. B.*:—*Held*, in a subsequent suit by the patentee against *C. D.*, that *C. D.* was

not concluded by the proceedings at law, to which he was not a party, and that he was not to be driven to contest the validity of the patent by *scire facias*.

After a patentee had established his patent as against one person at law, he instituted proceedings for an infringement against another in equity. The Court granted the Defendant an issue as to the novelty of the invention, but refused it as to the utility of the invention and the sufficiency of the specification, holding that the utility was not contested or had been proved in the suit, and that the sufficiency of the specification had been already decided in the action at law, a decision in which this Court, so far as it was matter of law not depending on the novelty of the invention, concurred.



1866.  
  
 BOVILL  
 v.  
 GOODIER.

proved. In *Michaelmas* Term, 1856, a rule was obtained by *Keyworth* to set aside the verdict and to enter a verdict for the Defendant or a nonsuit, or to have a new trial. This rule was discharged by the Court of Queen's Bench, after full argument, on the 28th of *May*, 1857; see *Bovill v. Keyworth* (a). In 1857, the Attorney-General declined granting a writ of *scire facias* to repeal the patent, and in *June*, 1863, the Privy Council extended the patent for five years, after a strenuous opposition on the part of some millers; but in which the present Defendant took no part.

The Defendant by his answer disputed the validity of the patent, and alleged that he had not infringed it.

The cause now came on for hearing.

Mr. *Grove*, Mr. *Buggallay*, Mr. *Hindmarch*, Mr. *Druce* and Mr. *Aston*, for the Plaintiff, argued that the Plaintiff having established the validity of his patent at law, and overcome all opposition before the Attorney-General and the Privy Council, the Court would act upon it.

They cited *De la Rue v. Dickinson* (b); *Lister v. Leather* (c); *Bovill v. Keyworth* (a); *Betts v. Menzies* (d); *Hills v. The London Gas Company* (e); *Davenport v. Goldberg* (f); *Foxwell v. Webster* (g); *Neilson v. Harford* (h).

Sir *R. Palmer* (Attorney-General), Mr. *Selwyn*, Mr. *Little*

- |                                             |                                           |
|---------------------------------------------|-------------------------------------------|
| (a) 7 <i>Ell. &amp; B.</i> 725.             | (f) 2 <i>Hem. &amp; M.</i> 282.           |
| (b) <i>Ibid.</i> 738; 3 <i>Kay &amp; J.</i> | (g) 3 <i>N. R.</i> 180, and 9 <i>Jur.</i> |
| 389.                                        | (N. S.) 1182.                             |
| (c) 8 <i>Ell. &amp; B.</i> 1004.            | (h) <i>Webster's Pat. Cas.</i> 331;       |
| (d) 10 <i>H. of L. Cas.</i> 117.            | and 8 <i>Cl. &amp; Fin.</i> 726.          |
| (e) 5 <i>Hurls. &amp; Nor.</i> 312.         |                                           |

*Little* and Mr. *Watkin Williams* argued that the patent was invalid, and that the present Defendant was in no way bound by the prior proceedings to which he was not a party.

1866.  
  
 BOVILL  
 v.  
 GOODIER.

They cited *Lang v. Gisborne* (a); *Hindmarch on Patents* (b); *Liardet v. Johnson* (c); *Crossley v. Beverley* (d); *Bett's Patent* (e); *Bridson v. Benecke* (f); *Newall v. Wilson* (g); *Crosskill v. Tuxford* (h); *Crosskill v. Ivory* (i); *Davenport v. Goldberg* (k); *Newall v. Elliott* (l); *Spence's Patent* (m); *Hindmarch on Patents* (n); *Russell v. Barnsley* (o); *Hills v. Evans* (p); *Woodcroft's Patent* (q); *Hill's Patent* (r).

Mr. *Grove*, in reply, referred to *Lister v. Eastwood* (s).

---

*The MASTER of the ROLLS.*

This suit is instituted by the Plaintiff to restrain the Defendant from infringing a patent, obtained by the Plaintiff for improving the grinding of flour, for collecting and utilizing the stive or small particles of flour, which formerly was almost all lost, and occasionally or generally created an injurious dust in the body of the mill itself. The Defendant, by his answer, contests both the validity of the Plaintiff's patent and also the fact of the infringement of it by him the Defendant.

Apr. 18.

The history of the Plaintiff's invention is an instance  
of

- |                                         |                                  |
|-----------------------------------------|----------------------------------|
| (a) 31 <i>Beav.</i> 133.                | (k) 2 <i>Hem. &amp; M.</i> 282.  |
| (b) <i>Page</i> 108.                    | (l) 1 <i>Hurl. &amp; C.</i> 797. |
| (c) <i>Webster, P. C.</i> 53.           | (m) 3 <i>De G. &amp; J.</i> 523. |
| (d) <i>Ibid.</i> 106.                   | (n) <i>Page</i> 306.             |
| (e) 1 <i>Moore, P. C. C. (N.S.)</i> 49. | (o) <i>Webster, P. C.</i> 472.   |
| (f) 12 <i>Beav.</i> 1.                  | (p) 31 <i>Law J. (Ch.)</i> 457.  |
| (g) 2 <i>De G., M. &amp; G.</i> 282.    | (q) 10 <i>Jur. (O. S.)</i> 363.  |
| (h) 5 <i>L. T. (O. S.)</i> 342.         | (r) <i>Webster, P. C.</i> 225.   |
| (i) 10 <i>Ibid.</i> 459.                | (s) 26 <i>L. T. (O. S.)</i> 4.   |

1865.  
 ~~~~~  
 BOVILL
 v.
 GOODWIN.

of the troubles which, in the present state of the law, await a successful inventor. The patent in question was taken out by the Plaintiff in *June*, 1849. Since then he has been engaged in constant and expensive litigation up to 1863, when the patent was prolonged by the Privy Council for five years. This, however, has not produced any termination to the litigation, of which the present suit is an instance. At the same time, much of this is incidental to the nature of things. The claim of having made an invention is not to preclude others from using an old process and old machines, because some person *bonâ fide* believes that he has invented what, in truth, has been long known; nor ought the fact that one person has infringed the patent, being ignorant that the discovery of the patentee was not a new one, to preclude another person from shewing that it had before been known and been in use. It may well be that Mr. *Bovill* invented the process he has patented, and yet that the same process may have been used by other persons before the date of Mr. *Bovill's* patent, and it would be injustice to stop the use of a process long employed, because some other person has subsequently discovered the same process. It would also be unjust, because one person has been unable to prove that the discovery was not new, to prevent another from doing so, and bind him by a proceeding over which he had no control and of which he knew nothing. The consequence is, that in almost every case, the Plaintiff has to establish his case, from the beginning, against any fresh person who chooses to impugn the patent and to contest its validity.

At the same time, the law properly attaches superior rights to a patentee who has established the validity of his patent, to those which belong to a patentee who has not done so. The former stands on a different footing, and

and though the patent may be contested by fresh persons, he will receive protection until the invalidity of it is shewn. The distinction hitherto made by Courts of Equity has been:—where the validity of the patent has not been the subject of any legal proceedings, the patentee must prove its validity at law, before the Court of Equity will protect him; but having once established its validity, then the Court of Equity will protect him against another person until that person proves its invalidity.

1866.

 BOVILL
 v.
 GOODIER.

Accordingly, the first thing I have to consider in this case is, the fact whether Mr. *Bovill* has established the validity of his patent in a Court of Law. If he has done so, it has been by the case of *Bovill v. Keyworth*(a). The Defendant contends that this case does not establish the validity of the Plaintiff's patent; and that, if it does, it is for an invention not infringed by him. The way in which the Defendant puts his case may be shortly stated thus: if the patent be such as is established by the case of *Bovill v. Keyworth*, then the Defendant has not infringed it; but if the patent be such as the Plaintiff now contends that it is, then its validity is not established by the case of *Bovill v. Keyworth*, and the patent so alleged is invalid, and principally by reason of its want of novelty.

In order to estimate the value of this argument, it is necessary to consider what the invention is which is described in the specification, and what the case of *Bovill v. Keyworth* has decided. The specification thus describes the invention of the Plaintiff:—

“Firstly, in an arrangement for ventilating the grinding surfaces of the millstones, and the introduction of air through the top stone, when fixed, either by blowing

ing

(a) 7 *Ell. & Bl.* 725.

1866.

BOVILL
v.
GOODIER.

ing or exhaustion. Secondly, in exhausting the air from the cases of the millstones, combined with the application of a blast to the grinding surfaces. Thirdly, in separating the stive or dust of flour from the air when exhaustion or blast is employed to facilitate grinding and preventing the dust and waste in the mill." Then further on he says this: "In carrying out the second part of my invention, when working millstones with a blast of air, I introduced a pipe to the millstone case from a fan or other exhausting machine, so as to carry off all the warm dusty air blown through between the stones to a chamber as hereinafter described, by which the dust in the mill is avoided and grinding improved. And this part of my invention relates only to sucking away the *plenum* of dusty air forced through the stones, and not to employing a sufficient exhausting power to induce a current of air between the millstones without a blast, this having before been practised as above mentioned. The third part of my invention consists in straining the stive or air which is surcharged with fine flour through suitable porous fabrics, which retain the flour and allow the air to pass through, and this I accomplish by exhausting the air from the millstone case, or other closed chamber, receiving the meal from the stones by means of a fan or other exhausting machinery, and blow the stive so exhausted into a chamber having its sides and top formed of one or more thicknesses of suitable porous fabrics to allow the air under pressure to pass out deprived of the flour by means of this filtration. I also obtain the same result by placing the filtering chamber between the stone case or chamber receiving the meal and dust from the stones and the exhausting machine. The stive or dusty air is then sucked through the filtering fabrics instead of being blown through, and the air passes away clean as before."

It

It is argued that this is merely a patent for a combination of three processes, each of which was old, and that all that *Bovill v. Keyworth* has done is, to determine that the specification correctly describes an invention consisting of the combination of the three; that this combination is new, and that in this consists the invention, and that *Bovill v. Keyworth* does not go beyond this. I have therefore, in the first instance, to consider whether the case of *Bovill v. Keyworth* has established the validity of each of these three matters separately, or only in combination with each other.

1866.

BOVILL
v.
GOODIER.

The judgment of the Court of Queen's Bench appears to me to determine the validity of each of these inventions. Lord *Campbell* says, in the first part, "the whole of the Plaintiff's process, if the combination is new, is certainly the subject of a patent, and so would the part No. 2, if taken separately, for exhausting the air from the cases of millstones, combined with the application of a blast to the grinding surfaces, as they introduce very important improvements in manufacturing wheat and other grain into meal and flour." Now that appears to me to point out that the No. 2, taken separately, is also described as an invention by itself and not in combination. That is made more clear afterwards. He says, if the specification does not point out the mode in which this is done it would be invalid. "But we are of opinion that the specification on the face of it cannot (as contended) be pronounced in point of law to be bad in this respect, and we are of opinion that the evidence adduced at the trial shews it to be quite sufficient." He says, "the exhaust produced by the pipe and fan is to be proportioned to the *plenum* caused by the blast, taking care not to produce the inconvenient current of air against which a caution is given. How can a judge take upon himself to say that this may not be enough to enable a

1866.

BOVILL
v.
GOODIER.

workman of competent skill to construct the machinery?" In a further place he says, "we do not think it necessary to try to reconcile the different parts of the specification (which are somewhat conflicting), or to give any positive opinion upon this question; for supposing the patent to be for a combination consisting of several parts for one process, we are of opinion that the Defendants are liable in this action for having used a material part of the process which was new for the same purpose as that mentioned in the specification, although they did not at the same time use all the parts of the process as specified." "If the fixed upper millstone were equally described by the Plaintiff in the statement and diagram to be found in his specification as part of the combination for which he took out his patent, as No. 2 is a material part of the combination and was new, we are of opinion that they cannot lawfully use No. 2 for the same purpose by substituting a rotating upper millstone for a fixed upper millstone, or by resorting to any other equivalent for any other separate part of the process specified."

Great stress was laid in the argument upon these words in the specification, "and this part of my invention relates only to sucking away the *plenum* of dust y air forced through the stones, and not to employing a sufficient exhausting power to induce a current of air between the millstones without a blast, this having been practised as above mentioned." But I am of opinion that the application of the exhaust to drawing away the *plenum* is a material invention of the Plaintiff by itself, although the combination of it with the other parts of the invention may be properly and validly claimed as another part of the Plaintiff's invention, and this double fact appears to me to be established by the passages in the judgment to which I have referred.

There

re is also this preliminary obstacle in the way of defendants on the question of the validity of the patent, namely, that the specification of the Plaintiff is a written document, of which the construction must be made in a Court of Law as a Court of Equity, and the Court of Queen's Bench has determined that this patent is valid, that is, that the invention is new, that it is useful, and that it is sufficiently described in the specification. The objections urged against it before the Court were urged at law, and were present to the mind of Lord *Campbell* when he delivered his judgment, and the words I have read appear to me to point to the validity of the patent, not only in respect of the combination of the matters stated, but also to the validity of each of the three separate parts which are separately and distinctly claimed as inventions by the Plaintiff in his specification. I am of opinion, therefore, that the sucking away of the *plenum* of dusty air forced through the stones is a separate and distinct part of the invention of the Plaintiff claimed by his specification, and that the Court of Queen's Bench has determined that this is valid.

I admit that this decision would not be conclusive at law in a fresh case, nor would it be binding on this Court if evidence were now produced which was not before the Court of Queen's Bench, but on this point I do not find any evidence has been laid before me not before the Court of Queen's Bench, with the exception of the other patents, but as to those, I give little weight to them. I think that they all differ essentially from the inventions of the Plaintiff as to the mode of drawing the dusty air from the *plenum*; they do not appear to have been successful. Indeed, the fact that the defendant does not use them, and that no one uses them, that they have all expired, is a proof that they are

1866.

 Bovill
 v.
 Goodwin.

1866.

Bovill

v.

Goodier.

not the same as that of the Plaintiff, which is confessedly a process of great value.

I am further of opinion that the decision of the Court of Queen's Bench also establishes the validity of the Plaintiff's patent as regards the third invention claimed, namely, the use of the stive room, and that this is effected in combination with the exhaustion of the air from the millstone cases. It does not appear to me that the forcing air into the millstone case from above is a necessary part of the invention. The invention, as described in the specification and as established in the Court of Queen's Bench, consists, I think, in the employment of a sufficient power to suck away the dusty air in the millstone case, and the discharging it through a porous fabric, by which the fine flour is retained and the air is allowed to escape. It is true that the air which is drawn away from the millstone case must find its admission into the millstone case from some separate entrance; but the invention now before me, as I understand it, consists in exhausting the dusty air in that case in such a manner as to draw it all off without employing such a force as to draw with it the meal, and to transmit the air so drawn off through a chamber formed wholly or in part of a porous fabric which will retain the dusty particles of flour and allow the air to escape.

The French patents which relate to this subject appear to me to be quite distinct from that of the Plaintiff; I think it unnecessary to go through them in detail. The idea was possibly present to the mind of one or more of the inventors, but they failed in discovering the method by which they could exhaust the dusty air merely, without drawing the meal with it; I am therefore of opinion that the validity of the Plaintiff's patent, as now claimed
by

by him, is established by the decision in *Bovill v. Keyworth*.

1866.

BOVILL
v.
GOODIER.

I have next to consider what the consequences are which flow from this, both as regards the Plaintiff and the Defendant. The consequences as regards the Defendant are nothing, if he has not infringed the Plaintiff's patent. Therefore, the next thing to be determined is, whether the evidence before me is sufficient to prove that the Defendant has infringed the Plaintiff's patent. The burthen of proving this lies on the Plaintiff. The evidence is to this effect; that the Defendant has employed a fan placed on the spindle of the millstones, working in the case below the lower millstone, and extending a little beyond the periphery of the millstone. This fan is driven by the ordinary power of the mill. The effect of the action of this fan is, that the dusty air of the *plenum* is driven or blown out into an escape pipe, and so on through another pipe or chamber into the open air. Some blast is produced by the centrifugal action of the millstones, but the revolution of the fan increases the ordinary centrifugal blast arising from the action of the millstones to an extent sufficient to drive the dusty air from the *plenum* into the escape pipe, without sending out the meal, which descends in the regular manner down the meal spouts.

I attended carefully to the evidence given on this subject in Court, in conjunction with the models then produced, and I listened attentively to the arguments of counsel on this point, and certainly no case was better argued. I have since read over again the evidence, and considered the whole matter; and my opinion at the close of the argument, since fortified by my examination and re-consideration of the subject, is, that the process used by the Defendant, which is Messrs. *Blake & Lee's* patent,

is

1866.
BOYILL
v.
GOODIER.

is substantially, that is in essential points, the same as the Plaintiff's patent; the only difference appears to me to be that the Plaintiff exhausts the *plenum* or removes the hot dusty air from the millstone case by means of a sucking process applied externally, which draws the air from the *plenum* through a shaft prepared for the reception of it, and that the Defendant exhausts the *plenum* or removes the hot dusty air from the millstone case by means of a blowing process, which drives the air from the *plenum* into a shaft prepared for the reception of it. I do not find that, before the Plaintiff's invention in 1849, any process had been discovered by which the hot, dusty air could be exhausted from the *plenum*, carrying with it the stive only, and carrying it, not into the body of the mill, but into a separate shaft where the stive could be collected and utilized. This is done in both the Plaintiff's processes and in that used by the Defendant. The Plaintiff sucks the air out; the Defendant blows it out—in both instances it is done by a fan. In every case where a fan is driven, it must suck the air from one place and blow the air into another place. In the Plaintiff's invention the fan is placed away from the millstone case in the air-shaft, and it draws the hot, dusty air from the millstone case into the shaft. In the Defendant's invention the fan is placed within the millstone case itself, and blows the hot dusty air from thence into the air-shaft. It is wholly immaterial, as it appears to me, for this purpose, whether the air that is expelled from the millstone case is drawn through the eye of the millstone case, or whether it is drawn up through the meal spout, or whether it is introduced through pipes constructed specially for the purpose of admitting the air. The invention consists in producing a blast of sufficient power, and exactly so regulated as to exhaust the hot dusty air from the millstone case, and drive it, with the stive only, into a shaft where it may be utilized and prevented from injuriously

injuriously affecting the air of the body of the mill. This appears to be done in both cases by the Plaintiff and by the Defendant; and as soon as the Court arrives at the conclusion that the invention of the Plaintiff is not confined to the combination of the matters described in his specification, but that it extends to this withdrawal, whether by expulsion or by exhaustion, of the dusty air from the millstone case for the purpose of utilizing the stive contained in it, as a separate and distinct invention, then it seems to me that the Defendant has made use of the invention of the Plaintiff, and that he has in all essential particulars adopted the same process.

1866.
BOVILL
v.
GOODIER.

With respect to the remaining part of the Plaintiff's invention, the separation of the stive from the air drawn or blown into the shaft, I entertain no doubt that the Defendant's is essentially an adoption of the Plaintiff's process. The blast from the fan must be sufficiently strong to blow the dusty air through the shaft, and ultimately into the open air; but in the Defendant's process this is done through a long pipe or horizontal shaft, at the bottom of which is placed the porous fabric which receives the stive, from whence it is removed from time to time. I am convinced on the evidence that this, although as I believe imperfectly, performs the same function as the Plaintiff's stive chamber performs; that it is intended to be, and that it is, an imitation of the Plaintiff's process, and that along the whole course of this shaft air escapes through the porous fabric, and deposits the stive along the course of it, which is removed from time to time by the Defendant, and that without the use of this porous fabric the stive would not be utilized.

I am of opinion, therefore, that the process used by the Defendant may be correctly thus described :—that
he

1866.
 ~~~~~  
 BOVILL  
 v.  
 GOODIER.

he has made an arrangement for ventilating the grinding surface of the millstones by a fan which is attached to the lower stone, and that, by means of this fan, he exhausts the air from the millstone case and removes the dusty air into a shaft, where the air surcharged with stive is partially strained through a porous fabric, and, in doing so, deposits the stive or finer particles of flour, which thereby become useful, instead of being injurious. I am of opinion that the whole of this is an infringement of the Plaintiff's patent, and that the invention and mode of doing these things is sufficiently described in the Plaintiff's specification, and the patent so described in the specification and so construed by the judges of the Court of Queen's Bench has been determined to be valid, with which decision, as far as I am able to judge from the evidence before me, I desire deferentially to express my concurrence. It certainly had not been my intention when I began to hear this case to go into or express any opinion upon the validity of the Plaintiff's patent, but the course which the case has taken, and the evidence gone into, has compelled me to investigate the matter to the extent of the materials laid before me, and I have thought it proper, that having formed an opinion, to express it, if, as I should hope, it may have the effect of preventing further litigation. I have therefore arrived, first, at the conclusion that the validity of the Plaintiff's patent, as now claimed by him, has been established at law, and also that the Defendant has infringed that patent.

There remains to be considered, as I before observed, what are the consequences which flow from these conclusions as regards the Plaintiff, and as regards the Defendant? In the first place, as regards the Plaintiff, I am of opinion that he is entitled to a decree for an injunction; but, on the other hand, as regards the Defendant,

ferdant, I am of opinion, that I cannot properly compel him to submit to the decision of the Court of Queen's Bench, or to acquiesce in any opinion I may have formed. He was no party to the suit of *Bovill v. Keyworth*; he is not bound by the proceedings in that case, and many cases are on record where, after the Plaintiff has established the validity of his patent in one case, it has been decided to be invalid in a second. Numerous cases have been cited before me; *Bridson v. Benecke* (a); *Newall v. Wilson* (b); *Hill v. Thompson* (c); *Croskill v. Tuxford* (d); *Croskill v. Every* (e); which establish that a Defendant is not to be concluded by a trial at law to which he is no party, and that he is not to be driven to contest the validity of the patent by a *scire facias*. It is true that the case of *Davenport v. Goldberg* (f) seems to point the other way, and it is also to be borne in mind that the law was established on this point at a time when the act of parliament had not been passed which compelled the Court of Equity itself to decide any question of common law which might come before it without the assistance of any other tribunal, as to which, however, it is proper to observe, that this is not so much a question of law as it is a question of fact.

I cannot also but bear in mind that, although I have considered the validity of the patent of the Plaintiff, it is only so far as regards the effect of the decision in *Bovill v. Keyworth*, and the sufficiency of the specification; but, as to the question of novelty, I have done so solely on the evidence at present laid before me, and I have also done so reluctantly, because I early felt the difficulty I should have in going into that question, and

I checked

1866.

BOVILL  
v.  
GOODIER.

(a) 12 *Beav.* 1.

(b) 2 *De G., M. & G.* 282.

(c) 1 *Webs. P. C.* 237.

(d) 5 *Law T. (O. S.)* 342.

(e) 10 *L. T. (O. S.)* 459.

(f) 2 *Hem. & Mill*, 282.

1866.  
~~~~~  
Bovill
v.
Goodier.

I checked the entering into it at first, as much as I could consistently with allowing the Defendant to bring forward his case. It is also a matter so far favorable to the Defendant that the form in which this case comes before me is that of a cause in which neither side has had an opportunity of knowing, before the hearing, what evidence he would have to meet, and which circumstance tends strongly to prevent the bringing forward of evidence which might, at the hearing, be material until after the opportunity of doing so is lost.

It is after I have considered all these matters that I have come to the conclusion, that the results above mentioned as those at which I have arrived ought not to prevent the Defendant from having, if he pleased to do so, a further opportunity of trying this question against the Plaintiff. I regret it much, because of the great expense which it will necessarily entail on both parties; but I think myself bound by the authorities to direct an issue to try whether the Plaintiff is the first and true inventor of the processes described in his specification, or of either, and which of them. This issue I will direct if the Defendant requires it.

I direct no issue as to the utility of the invention, or as to the sufficiency of the specification. I consider the former of those matters to be not contested or to be established by the evidence; and as to the second, I consider it to be decided definitively in favor of the Plaintiff by the decision in *Bovill v. Keyworth*, which I have minutely examined, and in which I have, after consideration, for the reasons I have stated, expressed my concurrence, so far as it is matter of law, not depending on the novelty of the invention. The novelty of the invention is a question which, in my opinion, I ought to allow the Defendant to try again, if he chooses to do

so;

so; but, in the meantime, I must restrain him from carrying on his present processes, which, in my opinion, infringe the Plaintiff's invention. I will reserve the costs of the cause until after the trial of the issue, and give either party liberty to apply.

1866.
Bovill
v.
Goodier.

NOTE.—The case was tried at law, when the Defendant was successful; but this Court directed a new trial.

In re DREW.
Ex parte MASON.

1865.
Dec. 12.
1866.
Mar. 2.
Apr. 18.

THIS was an appeal from the decision of the registrar under the Land Registry Act (25 & 26 Vict. c. 53), deciding that a proviso, in a deed of the 3rd of August, 1863, did not constitute such a charge on the land sought to be registered, as ought to be noticed on the register.

Mr. *Drew*, the owner of some land, divided it into seven lots, which were numbered from 71 to 77 inclusive. In 1863, Mr. *Drew* sold lots 71 and 72 to Mr. *Mason*, and arrangements were made between them for the formation and the future repair of a road, which was common to all the lots.

To carry this arrangement into effect, Mr. *Drew* by an indenture dated the 1st of August, 1863, conveyed lots 71 and 72 to Mr. *Mason*. All the seven lots were shewn in a plan on the conveyance.

About the same time, an indenture bearing date the 3rd of August, 1863, was executed by and between

A. B., the owner of seven lots of land, sold two of them to *C. D.*, and he retained five. They entered into mutual covenants for bearing, in proportion, the expenses of a road common to all the lots, and there was a proviso that the expenses should be a charge upon the owners of the seven lots in proportion. *Held*, that the land was not charged, and that *A. B.* was entitled to have an indefeasible title to his five lots registered under the 25 & 26 Vict. c. 53, without no-

ticing the proviso or the claims of *C. D.*

1865.

In re
DREW.

Ex parte
MASON.

Mr. *Drew* of the one part, and Mr. *Mason* of the other part, by which it was witnessed, and he, Mr. *Drew*, for himself, his heirs, executors and administrators, covenanted with Mr. *Mason*, his heirs and assigns, that he, Mr. *Drew*, would within six months complete a road set out on the said plan attached to the conveyance, and a copy of which was annexed to this deed, so far as related to the pieces of land numbered 71 and 72; and further, that he would keep the road repaired, and that if he failed in doing so, it should be lawful for Mr. *Mason* to do so, and that Mr. *Drew* would, on demand, pay to Mr. *Mason*, his heirs, administrators and assigns, the whole of the money expended by him or them in completing, and two-thirds of the money expended by him or them in repairing the road. And *Mason* covenanted with *Drew*, his executors, administrators and assigns, that after the completion of the road, he, his heirs, executors, administrators or assigns, or the person for the time being entitled to the pieces of land numbered 71 and 72, would pay one-third of the money which Mr. *Drew* or his heirs, executors or administrators should have expended in the reparation of the said road, until it should be taken to by the parish or other lawful constituted authority.

Then followed this proviso :—

“ Provided always, and it is hereby mutually agreed and declared, between and by the parties to these presents, that, in addition to the covenants hereinbefore contained, it is intended that, by virtue of these presents, the costs and expenses of the repair of the said proposed road shall, until the same shall be taken by the parish or other lawfully constituted authority, be considered as a charge in equity, and, as far as circumstances will admit, at law also, upon the owners for the time being of the several pieces of land numbered respectively

tively 71, 72, 73, 74, 75, 76 and 77 in the said plan, to such an extent, as that each such owner, or if more than one, each set of owners, shall be chargeable with such a part of the costs and expenses of the said repairs as shall bear the same proportion to the whole of such costs and expenses, as the quantity in acres, roods and perches of the said closes or pieces of land of which he or they shall be the owner or owners, shall bear to the aggregate quantity of the said several closes or pieces of land."

1865.

In re
DREW.
Ex parte
MASON.

In 1865, Mr. *Drew* applied to the Land Registry Office for the registration of an indefeasible title to the lots numbered 73, 74, 75, 76 and 77. But Mr. *Mason*, having notice of this, claimed to have an entry or notice made on the record of title of the proviso in the deed of the 3rd of *August*, 1863, which he contended constituted a lien on the land sought to be registered.

The Registrar having decided against Mr. *Drew*, he appealed under the 25 & 26 *Vict.* c. 53, s. 17, which provides, "that if, in making up the record of title, any question shall arise as to the construction of any deed, &c., &c., or the mode in which any entry ought to be made in the record of title, or any doubtful or uncertain right or interest stated or dealt with by the Registrar, it shall be competent for the Registrar or for any of the parties interested to refer the same to a Judge of the Court of Chancery; if, on such reference, the Judge, having regard to the parties appearing before him, shall think proper to decide the question, he shall have power to do so, or to direct any proceedings at law or in equity to be instituted for that purpose, or, at his discretion and without deciding such question, to direct such particular form of entry to be made on the record
of

1865.

~~~~~

*In re*  
*DREW.**Ex parte*  
*MASON.*

Dec. 12.

of title, as, under the circumstances, shall appear to be right."

---

Mr. *Fry*, on behalf of Mr. *Mason*, now asked the Court to direct an entry of the proviso on the register. He was proceeding to argue the case ; but no one appearing on behalf either of the Registrar or Mr. *Drew*,

*The MASTER of the ROLLS* said, I cannot determine this question unless it is argued. I cannot overrule the decision of an officer of the Court, of great knowledge and experience, upon a mere *ex parte* argument.

---

Dec. 13.

On appeal, the Lord Chancellor thought that the course in *Re Kennard (a)* ought to be followed, and that a statement should be prepared, and the case brought again before the Master of the Rolls.

---

1866.

Mar. 2.

That course having been taken, the case again came before the Court.

Mr. *Fry* for Mr. *Mason*, in support of the application. It was clearly the intention of the absolute owners to make the repairs of this road a charge on the property, and which they were entitled to do; *Roe v. Trammer (b)*.

Secondly. But even if the obligation does not attach to the land itself, still all purchasers with notice would  
be

(a) 11 Jur. 27.

(b) 1 Wills, 682 and 2 Wils. 75.

be bound to give effect to it; *Tulk v. Moxhay* (a). Mr. *Mason's* rights ought therefore to be reserved in the record of title.

1866.

~~~~~

In re
DREW.

Ex parte
MASON.

The MASTER of the ROLLS referred to *Western v. Macdermot* (b).

The MASTER of the ROLLS.

There is a considerable inconvenience arising from the mode in which appeals are heard under the Land Registry Act. They are, in fact, *ex parte*. The person who is interested in contesting the claim of the Appellant either does not appear, or, as is the case in the majority of instances, is unable to appear. For instance, if the Registrar determines that the person who seeks to have his land and title to it registered has not a clear title, and that person appeals to the judge in chancery who is intrusted with the duty of revising the opinion of the Registrar, the argument is necessarily one sided. The person in possession contends that he has made out a good title to the land, the Registrar thinks that he has not done so, but the Registrar does not appear to support his own decision, and no other person exists who can be served or required to appear to oppose the claim of the possessor and owner of the land.

Apr. 18.

In the present case, I should have thought that an exception would have occurred to this, the general rule, for, in this instance, the Appellant seeks to have a proviso noticed on the register, which, if registered, will be a charge on the property of the claimant. But Mr. *Drew*, who is the owner of the property sought to be registered with an indefeasible title, does not appear to support

(a) 11 *Beav.* 571, and 2 *Phill.* 774.

(b) *Ante*, p. 213.

1866.

*In re**DREW.**Ex parte*
MASON.

support the decision, and no other person exists who can be served or required to appear to oppose the claim of the possessor and owner of the land. I have solely the argument of Mr. *Mason's* counsel, who is opposed to the decision of the Registrar, to assist me in coming to a conclusion.

The covenant is in these terms :—[His Lordship read it, see *ante*, p. 444].

Before I mention the rest of the deed, which contains the proviso, I should notice, that the effect of it, up to this point, is a pure personal covenant on both sides, there is nothing to affect the land, but immediately following is set forth the proviso in question, which it is contended has this effect. It is in these words :—[His Lordship read it ; see *ante*, p. 444.]

The question is, whether this proviso ought to be noticed in registering an indefeasible title of the pieces numbered 73, 74, 75, 76 and 77 on the plan above mentioned.

Upon carefully considering this question, I am of opinion that this ought not to be noticed in the register of the five pieces of land above mentioned. In the first place, it is to be observed, that the covenant contained in the proviso is not a covenant running with the land, still less is it any charge or burthen attaching to the land itself ; it is merely an undertaking by Mr. *Drew* and Mr. *Mason*, as far as they can, that the owner of each of the five pieces of land shall be bound by the same covenants as those by which Mr. *Drew* and Mr. *Mason* are bound ; that they shall have the same rights and be subject to the same obligations : but that is all. I see nothing in this which can properly be made the subject of registration ; it is no interest in the land
itself;

itself; nor does it arise out of it; and is merely a personal matter, binding the parties to this deed and no other persons. It is a mere personal obligation, which the parties to the deed covenant that they will endeavour to induce subsequent owners of the land to take upon themselves and undertake to fulfil. But in this endeavour, it is possible that the parties to the deed may fail, in which case, the remedy is not against the land, which is not charged with the expenses of the repair of the road, but solely against the covenantors and their representatives.

I am, therefore, of opinion that the Registrar under the Land Register Act has come to a correct conclusion, and that I must make no order on this application.

1866.

In re
DREW.

Ex parte
MASON.

Re THE EXHALL COAL COMPANY
(LIMITED).

Re BLECKLEY.

Feb. 12.
Apr. 19.

THIS was a summons adjourned from chambers by Mr. Bleckley, the trustee and original promoter of the *Exhall Mining Company*, seeking to have such of the assets as were still belonging to this company (which was insolvent and in the course of being wound up) applied in payment of liabilities incurred by him on behalf of the company. This was resisted by the debenture holders of the company.

The right of a trustee to be indemnified out of the trust property is the first charge thereon, and it has priority to any charge created upon it by the *cestuis que trust*. And, consequently, the right of a trustee of a public company to be indemnified out of the property has priority over the debenture creditors.

The case arose thus:—the association or company to take and work the mine was formed in the year 1852, and it was, at first, intended to work it on the cost book principles. On the 10th June, 1852, the lessor, Mr.

1866.
 ~~~~~  
 Re  
 THE EXHALL  
 COAL CO.  
 LIMITED.  
 Re  
 BLECKLEY.

*Blakesley*, executed a lease to *William Law*, *Henry Bleckley*, *Thomas Masters* and *Robert William Crowe*, their executors, administrators and assigns for sixty-three years from 1st *May*, 1852, paying a royalty of one-eighth of the gross moneys for which the coals were sold, if the quantity were under 40,000 tons annually; one-ninth when the coals exceeded 60,000 tons in any one year, and one-tenth when the coals exceeded that amount; and paying also a royalty of one-eighth of the gross moneys for which the iron-stone sold, with a proviso that the royalty should not, in the first year, be less than 500*l.*, 750*l.* in the second, and 1,000*l.* in every succeeding year.

In *January*, 1854, *Robert William Crowe*, with the concurrence of Mr. *Blakesley*, assigned his one-fourth in the said mine to the three other lessees, and on the following day *Law*, *Bleckley* and *Masters* executed a declaration of trust that they held the mines for the sole use and benefit of the *Exhall Mining Company*.

In *November*, 1854, the present company was formed.

It appeared that the mine could not properly be worked on the cost book principle, and, in consequence, this company was formed to work it on the principle of the Joint Stock Companies Act on limited liability. Accordingly, in *January*, 1857, the company was registered under the act of 1856, and the articles of association were executed in *April*, 1857. By the 7th and 8th articles of association of the company, the property of the company was to be vested in the trustees, who were to be indemnified against all liabilities affecting it, other than and except what they might incur from their own wilful neglect and default.

Two other persons (*Black* and *Clark*) were named as trustees of the company, and it was intended that the property of the company should be conveyed and the lease assigned to them upon such trusts.

1866.

Re  
THE EXHALL  
COAL CO.  
LIMITED.

Re  
BLECKLEY.

This had not, in fact, been carried into effect, and Mr *Bleckley* remained, as before, the trustee for the company of the mine, fixtures, plant and machinery, and was the person, who, at law and in fact, was responsible for the rent to the lessor Mr. *Blakesley*.

In 1860, debentures were issued by the company of 100*l.* each, by which the company assigned to the creditors "all and every the undertaking, mines, buildings, plant and assets, real and personal, of the company" and the estates, to hold until repayment, on a fixed day, of the 100*l.* out of the corporate assets of the company, which alone should be charged therewith.

The company was being wound up under an order made in the year 1864.

The rent due for the mine had been duly paid down to May, 1864, but the legal personal representatives of the lessor had brought an action for the rent due since that time against Mr. *Bleckley*, and he had been compelled to pay the amount of the rent due into Court, as the price of the injunction to restrain that action, he being, at law, the person liable to discharge it.

There was now a sum of 1,016*l.* in Court, which had arisen from the sale of the fixtures, plant and machinery at the mine. Mr. *Bleckley* claimed this as a fund to indemnify him against the claim of the lessor. On the other hand the debenture holders insisted that it ought to be divided amongst them.



1866.  
 Re  
 THE EXHALL  
 COAL CO.  
 LIMITED.  
 Re  
 BLECKLEY.

Mr. *Jessel* and Mr. *W. W. Cooper*, for Mr. *Bleckley*, argued, first, that the debentures were void, being unauthorized. Secondly, that the fund in question was primarily liable to indemnify the trustee, first, by virtue of the articles, and secondly, by the general law of this Court, which gave to a trustee the first charge on the property, as against his *cestuis que trust* and all claiming under them, and for whom he was a trustee. They cited *Furness v. The Caterham Railway Company* (a); *Legg v. Mathieson* (b).

Mr. *Southgate* and Mr. *Locock Webb*, for the debenture creditors, argued that they had the first charge, by virtue of the assignment to them. Secondly, that the fund in question had arisen from property severed from the leasehold, and no longer the subject of the trust; and that the order for sale was for the benefit of the creditors of the company generally, and reserved no right in favor of the trustee. They cited *Ernest v. Nicholls* (c); *King v. Marshall* (d).

#### *The MASTER of the ROLLS.*

Apr. 19. On considering the whole matter, I am of opinion that Mr. *Bleckley* is entitled to this sum. He was the trustee of the mine, including the fixtures, the plant and machinery; he is the owner of this property at law, and when called upon to account in equity, he is entitled to deduct, out of the trust property in him, all that is necessary for the purpose of repaying him the sums he has properly paid, and of indemnifying him against such sums as he is liable to pay in the discharge

(a) 27 *Beav.* 358.  
 (b) 2 *Giff.* 71.

(c) 6 *H. of L. Cas.* 401.  
 (d) 33 *Beav.* 565.

charge of his trust ; and, in my opinion, this liability to repay and to indemnify him is the first charge on the property.

1866.

Re  
THE EXHALL  
COAL CO.  
LIMITED.  
Re  
BLECKLEY.

It has been argued before me, that the debentures are invalid. I think it unnecessary to enter into that question ; for the present purpose, I assume them to be valid ; but, in my opinion, the debenture holders can only claim the property belonging to the company after payment of the charges previously and properly attaching thereto, of which I think the indemnity of the trustees is one. The debenture holders can only take all that the company could give, the company could only give the net produce of the property, after discharging the charges properly attaching thereto, and, in my opinion, the first charge on the property is the indemnity of the trustees. I do not put this on the question of contract, arising from the 7th and 8th clauses of the articles of association, because, in my opinion, it is a right incidental to the character of trustee and inseparable from it, that he should be saved harmless from obligations which are attached inseparably to his office, and by which anyone taking a charge upon or mortgage of the mine from the *cestui que trust* is bound.

Assuming the mine to be now a valuable property, it is clear that the trustee would be entitled to deduct all that he had properly paid for the preservation of that property. If he had parted with the mine, in accordance with the directions of his *cestui que trust*, he would still, in my opinion, be entitled to recoup himself out of any money belonging to the company in his hands.

The fact that the fixtures, plant and machinery have been sold, under the order of the Court, by the Official Liquidator,

1899.

Re  
The Eastern  
Case Co.  
Liquidator.  
Re  
Bleckley

Liquidator, in the course of the proceedings for winding up the company, does not, in my opinion, make any alteration in the case. The Court never allows the steps it directs to be taken for the realization of property to vary the rights of the parties; this is always effected without prejudice to the rights and interests of any of the parties concerned. Nor is it necessary, in any such case, to introduce words to save the right of the parties; such words, when used, are, at the best, superfluous, and they usually have an injurious effect, as intimating a doubt that, without them, such rights would not be preserved.

I am therefore of opinion that Mr. *Bleckley* has exactly the same rights as if such fixtures, plant and machinery had not been sold, and that he is entitled out of the money produced thereby, as far as the fund will extend, to be repaid the sums he has already spent, and also to be indemnified against the future liabilities which attach to him solely in his character of a trustee.

I must therefore order the 1,016*l.* to be paid to Mr. *Bleckley*, subject to payment of such costs as are properly payable out of it, if there be no more funds belonging to the company applicable for that purpose.

1865.

## LEIGH v. LLOYD.

**M**R. *Wood*, a member of a benefit building society, was the owner of some leasehold property at *Woodford*. He entered into an arrangement with the society to get an advance of 200*l.*, in the usual way, upon the security of his leasehold property, and on the 1st of *May*, 1849, he deposited with the society the title deeds of this property, and signed a memorandum, by which he "engaged to execute a mortgage to the society" for 200*l.*, when called on so to do.

Accordingly, on the 20th of *July*, 1849, *Wood* executed an assignment of the leasehold to the society, by way of mortgage to secure the 200*l.* This mortgage contained a power of sale in default of payment. The advance was made by four instalments of 50*l.* each on the 2nd of *January*, the 12th of *June*, the 20th of *July*, and the 26th of *September*, 1849.

*Wood* having made default, the society on the 18th of *May*, 1856, sold and conveyed the property to the Plaintiff in consideration of 240*l.*, and the Plaintiff entered into possession.

So far the Plaintiff's title appeared complete, but in 1863 the Defendants *Lloyd* and *Batley* commenced an action of ejectment against the Plaintiff to recover possession of the property. They founded their title on a deed dated the 2nd of *June*, 1849, executed between the equitable and the legal mortgage to the society, by which *Wood*, unknown to the society, had assigned the legal estate in the leasehold to these Defendants on certain trusts in favor of *Wood* and his family. This assignment was stated

Apr. 20.

*A.* mortgaged some property to *B.* by deposit of deeds, with a written engagement to execute a mortgage when called on. *A.* next sold and conveyed the legal estate to *C.*, subject to the mortgage. Afterwards *A.*

executed the mortgage to *B.* This contained a power of sale, under which *B.* sold the property to the Plaintiff:—

Held, that *C.* was bound by the power of sale and the sale, and that he was a trustee for the purchaser.

Necessity of proving a deed by the attesting witness, where its validity and the payment of the consideration is contested by a person not a party to it.

1865.

LZIGH

LLOYD.

stated to be in consideration of 150*L* ; but it was made expressly "subject" to the mortgage to the society, "with all benefit of the proviso for redemption, in the mortgage deed thereof."

The Plaintiff filed this bill in 1864, for an injunction to restrain this action, and to obtain a declaration that the Defendants held the legal estate in trust for the Plaintiff. The bill contested the *bona fides* of the deed of the 2nd of *June*, 1849, and the payment of the alleged consideration money.

Mr. *Southgate* and Mr. *Marten* for the Plaintiff. The Defendants obtained the legal estate in this property, with notice of the society's mortgage, and expressly subject to it ; they are, therefore, bound by that mortgage. The engagement to execute a mortgage deed necessarily implies a proper mortgage containing power of sale ; *Russell v. Plaice* (a) ; *Bridges v. Longman* (b).

Secondly, the conveyance to the Defendants is fraudulent and void, and the consideration mentioned in it was never paid. The admission or proof of its execution by *Wood* is not sufficient ; the attesting witnesses ought to have been called in order to give the Plaintiff, who contests the deed and is no party to it, the opportunity of cross-examining them.

Mr. *Selwyn* and Mr. *G. L. Russell* for the Defendants. The Defendants took subject to the "mortgage deed ;" but none had then been executed ; there was nothing, at that time beyond the memorandum. The Defendants, therefore took subject only to the rights given to the Plaintiff

(a) 18 *Beav.* 21.(b) 24 *Beav.* 27.

Plaintiff by the memorandum, and that does not warrant the introduction of a power of sale into the mortgage. The remedy of an equitable mortgagee is foreclosure, and not sale; *Moore v. Perry* (a); *Underwood v. Joyce* (b); except under the statute 15 & 16 Vict. c. 86, s. 48; and see *Cox v. Toole* (c).

1865.

LEIGH  
v.  
LLOYD.

Again, none of the advances were made by the society prior to the deed of the 2nd of *June*, and the liability of *Wood*, at that time, could only be for the first instalment of 50*l*. The execution of that deed by *Wood* is admitted, and no further proof of it is necessary.

*The MASTER of the ROLLS* (after stating the facts of the case):

The Defendants purchased this property, and took a conveyance of it expressly subject to the mortgage, which very properly contains a power of sale. Is it possible to cut that power of sale out of the deed, and say that there has not been a valid sale under it? I think not.

The society have advanced their money without any notice of the conveyance to the Defendants, and on the belief that the property was unincumbered. It follows, therefore, that the Defendants take subject to the mortgage, and that they are necessarily trustees for the mortgagees, and for the Plaintiff who claims under them.

As to the proof of the deed, when the execution of a deed and of the payment of the consideration money is contested by a third party, it is impossible, upon the admission of the execution of the deed and proof of the signature of the receipt, to dispense with the usual proof

(a) 1 *Jur.* (N. S.) 126.(b) 7 *Ibid.* 566.(c) 20 *Beav.* 145.

1865.

LEIGH  
v.  
LLOYD.

proof by the attesting witness. If the execution of a deed is disputed, you must prove it by the attesting witness in order to give to the opposite party the opportunity of cross-examining him.

I assume that the deed of the 2nd of *June*, 1849, is a valid deed as between the parties thereto. I decide nothing as to that, but I say, that the conveyance of the legal estate to the Defendants, if attempted to be used against the building society, was fraudulent and void, and that the Defendants to whom *Wood* conveyed the legal estate are trustees of it for the society and those claiming under them, and are bound to convey it to them.

I will make a declaration to that effect with costs.

---

NOTE.—Affirmed by Lord Cranworth, L.C., 25th *July*, 1865 (34 *L. J.*, *Chanc.* 646).

---

1866.

Apr. 25.

A person voluntarily gave his promissory note to trustees for his natural child, and deposited with them the title-deeds for the purpose of carrying into effect his intention as to the promissory note:—*Held*, that a valid trust had been created.

## ARTHUR v. CLARKSON.

THE testator made several wills, by which he gave 100*l.* to his natural daughter *Jane* absolutely, and 1,000*l.* to his natural daughter *Hannah* and her children.

On the 29th of *December*, 1862, the testator gave his promissory note for 1,000*l.*, payable to two friends, in trust for *Hannah* and her children, and his promissory note, to the same persons, for 100*l.*, in trust for *Jane*. He afterwards made another will, by which he gave nothing to his daughters, and stated, that he had, by promissory notes of even date, “made payable to his two trustees,” provided for *Hannah* and *Jane*.

The

The promissory notes were delivered to the trustees, together with a box containing the testator's title deed, for the purpose of carrying into effect his intention with respect to the promissory notes. They remained in the trustees' possession down to the testator's death in May, 1864.

1866.  
ARTHUR  
v.  
CLARKSON.

This suit was instituted by the legal personal representatives to have the rights of the parties declared.

Mr. *Baggallay* and Mr. *C. Hall* for the Plaintiffs. The trustees cannot recover on the promissory notes at law, for want of consideration, and therefore an effectual trust has not been created. The deeds, if delivered over for the purposes alleged, can only stand as a security for what is recoverable by virtue of the promissory notes.

Mr. *Jessel* for *Hannah* and her child, Mr. *Williamson* for the trustees, and Mr. *Rowcliffe* for *Jane*, argued that there was a perfect trust created by the deposit of the deeds for the amount of the promissory notes.

They cited *Lloyd v. Chume* (a); *Dawson v. Kearton* (b); *Burkitts v. Ransom* (c).

*The MASTER of the ROLLS.*

The promissory notes were given to secure the two sums, and the deeds were deposited in trust to secure the amount. There is evidence of that, and there is no getting over it.

If a man gave the title deeds of his estate to *A. B.*,  
and

(a) 2 *Giff.* 441.  
(b) 3 *Sm. & Giff.* 186.

(c) 2 *Coll.* 395.



1866.  
  
 ARTHUR  
 v.  
 CLARKESON.

and said, "keep them as a security for 1,000*l.* for my brother," and gave his promissory notes at the same time for that amount, it would be a valid trust, which could not be defeated.

I must direct payment of the 1,000*l.* and 100*l.* with interest, if assets of the testator be admitted.

---

CLARK *v.* WALLIS.

Apr. 26.

A decree for specific performance was made against a purchaser in possession, but he was unable to complete the purchase. The Court rescinded the contract and ordered the purchaser to pay to the vendor the rents received by him, together with the costs of suit and those occasioned by the non-completion of the purchase.

THIS was a suit, instituted by a vendor against the purchaser in possession, for the specific performance of the contract. The decree was made on the 20th of *December*, 1865, with costs, and the Chief Clerk had reported in favor of the title.

The purchaser was unable to pay the purchase-money and complete the contract.

Mr. *Jones Bateman* now moved to rescind the contract.

He cited *Sweet v. Meredith* (a); and see *Foligno v. Martin* (b); *Simpson v. Terry* (c).

*The MASTER of the ROLLS.*

All I can do is this :—I will order the contract to be rescinded and the Defendant to deliver up possession of the estate to the Plaintiff. Then take an account of the rents received by the Defendant, and tax the Plaintiff's costs occasioned by the non-completion of the

(a) 4 *Giff.* 207.  
 (b) 16 *Beav.* 586.

(c) 34 *Beav.* 423.

the purchase and his subsequent costs. The Plaintiff must be at liberty to retain the amount out of the 115*l.* paid to him on account of the purchase-money. If that should be insufficient, the Defendant must pay the deficiency.

1866.

CLARK  
v.  
WALLIS.

---

NOTE.—*Reg. Lib.* 1866, A., 948.

---

## DALTON v. FURNESS.

Apr. 19, 23.

A WRIT of *fi. fa.* issued out of this Court to the sheriff of the county of *Southampton*, against the goods of the *Huxley Railway*. On the 9th of *March*, 1865, the sheriff seized some rails and other chattels on the railway. But, on the same day, *Furness*, the contractor to the line, gave notice to the sheriff that the property seized belonged to him, and he gave a second notice on the 14th. On the 16th of *March* the sheriff was ordered to make his return to the writ on the 17th. On the 19th of *March*, he filed a bill of interpleader against *Furness* and the judgment creditors; but he did this without having previously informed the judgment creditors of the claim set up by the contractor. The Plaintiff, on the 21st of *March*, gave notice of motion for the usual interpleading order, and, on that day, the judgment creditors, for the first time, had notice of the contractor's claim, and on the 22nd they wrote to the solicitors of *Furness* that they would authorize the sheriff to withdraw.

Whether a sheriff can file a bill of interpleader in respect of goods which it is alleged he has wrongfully seized, *quere.*

A sheriff, who has seized goods under a *fi. fa.* issuing out of this Court, and which are claimed by a third party, cannot file a bill of interpleader until he has given notice to the judgment creditor of the adverse claims to the goods seized.

The motion stood over, and the judgment creditors abandoned all claim to the goods seized by the sheriff.

The motion was now (19th *April*) brought on, and the

1861. the only question in argument was who ought to pay the costs of the suit.

—  
ACTION  
2  
FURNER.

Mr. Gardner for the Plaintiff. The Plaintiff is a mere stakeholder, who has no personal interest in the matter. He is therefore entitled to call on the Defendants for interpleader. Consequently, his costs ought to be paid by the Defendants or one of them. He cited *Symes v. Muggeridge* (1); *Hale v. The Saloon Carriages Company* (2); *Mason v. Harrison* (3).

Mr. Rogers for Furner. The sheriff has wrongfully seized Furner's goods. There can be no interpleader where there is a wrongful taking: and Lord Eldon thought that a sheriff could not file a bill of interpleader: *Stangor v. Louisa* (4). The Plaintiff ought therefore to pay the costs of this suit. He also referred to *Tufan v. Harding* (5); *Story on Equity* (f).

Mr. Speed, for the judgment creditors, argued that this Court had no jurisdiction in the present case; that the sheriff could not compel an interpleader in this Court, and that, before filing a bill of interpleader, he was bound to inform the judgment creditors of the adverse claims, and give them the opportunity of deciding on the course they would take. That, at law, the sheriff never got costs, and the parties were put on terms not to bring an action against him. He cited 1 & 2 Will. 4, c. 58; 1 & 2 Vict. c. 48, s. 2; 23 & 24 Vict. c. 126, ss. 12, 13; *Chitty's Archbold* (g); and see *Chitty's Stat.* (h).

Mr.

(a) 20 Beav. 47.

(b) 4 Drew. 492.

(c) 5 Sim. 19.

(d) 1 Ves. & B. 334.

(e) 29 L. J. (Chanc.) 225.

(f) Vol. 2, p. 105.

(g) Page 1315.

(h) Vol. 2, tit. Interpleader.

Mr. *Gardiner* in reply. This *fi. fa.* issued out of chancery, and therefore the sheriff could not apply to a Court of Law. The cases before Lord *Cottenham* and the Vice-Chancellor of *England* are distinct authorities for the proposition that the acts cited do not apply to a Court of Equity; and *Tufts v. Harding* (a) shows that the sheriff is strictly a mere stakeholder having no interest, and that he may file such a bill as the present.

1866.  
DALTON  
v.  
FURNESS.

---


*The MASTER of the ROLLS.*

In this case, I am afraid the sheriff is in the wrong. Being intrusted with a *fi. fa.* against the railway company, he levies on the goods of a contractor which were lying on the line of railway, and ostensibly the property of the company. Thereupon the contractor gives notice to the sheriff that the goods are his, and not those of the company, and he threatens to bring an action against the sheriff if they are not restored to him. The levy took place on the 9th of *March*, 1866, and the contractor gave notice on the same day. Afterwards, on the 14th of *March*, he gave a second notice, by which he made a distinction between the two sorts of rails. He said that those rails which weighed forty pounds by the yard and upwards were his, and that those which were not of that weight belonged to the company; but, he added, you must make the distinction. He also claimed the rolling stock to be his.

Apr. 23.

The sheriff gave no notice of this to the judgment creditors, who knew nothing about the contractor's claim; and on the 16th of *March*, the judgment creditors

(a) 29 *Law J. (Chanc.)* 225.

1866.  
  
 DALTON  
 v.  
 FURNESS.

ditors obtained an order on the sheriff to make his return on the 17th, and which would, of course, be followed by an attachment if he did not make it.

The sheriff filed his interpleader bill on the 19th of *March*, and gave notice of motion for the 22nd. But it was not until the 21st that the judgment creditors had any knowledge of what had been actually seized, or what had been claimed by the contractor.

The notice of motion stood over until next day. It was not heard then, but they asked time to look into the matter, and it stood over until the second seal in *Easter Term* (19th *April*). On that day, the judgment creditors say, "we find that these goods were not the property of the railway company, and we disclaim any interest in them, and we should have done so if the sheriff had applied to us before."

Upon which, the sheriff gives up the goods; but he now says to the judgment creditors, "my costs of this suit you must pay me." The judgment creditors, on the other hand, say, "you had no right to file a bill of interpleader at all, you seized the goods at your own peril, and you ought to have given us notice of the adverse claim." They referred to the case of *Slingsby v. Bolton*(a), where Lord *Eldon* lays down the proposition that a sheriff cannot file a bill of interpleader at all, he being bound to take the goods at his own peril. I doubt, having reference to more modern decisions, whether I should be disposed to fix the rule so tightly as to say that a sheriff cannot file a bill of interpleader at all. But it is clear that he cannot do so until he has informed the judgment creditors of the adverse claim, and ascertained

(a) 1 *Ves. & Bea.* 334.

ascertained whether they claim the goods he has seized, or will give them up. I am therefore of opinion that the sheriff, who has not done this, is in the wrong, and that this bill must be dismissed with costs, to be paid by the Plaintiff.

1866.  
DALTON  
v.  
FURNESS.

JOYCE v. RAWLINS.

**M**R. *KINGDON* applied, under the 15 & 16 *Vict.* c. 86, s. 52, for an order to revive against the executors of a deceased Defendant. They had not as yet proved the will of their testator, but it was alleged that they had acted.

*Apr. 26.*  
An order to revive, under the 15 & 16 *Vict.* c. 86, s. 52, cannot be obtained against executors who have not proved the will, though it is alleged they have acted.

He argued that as the Plaintiff might file a bill against executors who had acted, so he might equally obtain the order now asked.

*The MASTER of the ROLLS.*

I do not think this is an ordinary case for revivor by order. You must cite the executors in the Probate Court and get a properly constituted legal personal representative.

[1861.]

## ALSTON v. TROLLOPE.

May 7.

In an administration suit, the administratrix and all the persons interested (except one who was not before the Court, declined to object that some of the debts which were claimed were barred by the Statute of Limitations. The Court, on the administratrix taking the risk, ordered payment of such debts.

**M**R. ALSTON died intestate, leaving a widow and five children: his widow became his administratrix.

This was a suit for the administration of his estate, and on the usual reference some of his debts appeared to be barred by the Statute of Limitations. The widow and four of the children were desirous that these debts should be paid, and they declined taking the objection. But the fifth son, who had gone to America in 1862 and had joined the confederate army but was believed to be dead, not being before the Court, the Chief Clerk thought he was bound himself to take the objection of the statute, and he disallowed these debts.

This was a motion to vary the certificate.

Mr. O. Morgan, for the Plaintiff, argued that there was no case in which the Court itself had insisted on taking the objection. That the administratrix fully represented the estate and was not bound to take the objection, though she might hereafter be answerable for not doing so.

[*The MASTER of the ROLLS*: The question is, whether I should take the objection. My difficulty is, that if the son were here he would be entitled to insist on the statute as a bar.]

Mr. Martineau, for the widow and all the four children,

children, supported the application, and, on behalf of the widow, offered to run the risk. He stated that the assets amounted to 1,000*l.*, while the debts were about 600*l.* in all. See *Shewen v. Vanderhorst* (a); *Fuller v. Redman* (b); *Phillips v. Beal* (c).

1866.  
ALSTON  
v.  
TROLLOPE.

*The MASTER of the ROLLS.*

I shall not raise the objection, but it must be understood that the administratrix pays these debts at her own peril, and that I do not give her any sanction for doing so. I will direct the payment, and it must appear on the order that the administratrix does not choose to raise the objection of the Statute of Limitations to the payment of these debts, and that all the parties to the suit consent to their payment.

(a) 1 *Russ. & Myl.* 347, and  
2 *Ibid.* 75.

(b) 26 *Beav.* 614.  
(c) 32 *Ibid.* 26.

THE ALEXANDRA HALL COMPANY.

*ROEBUCK'S CASE.*

THIS was an application by Mr. *Roebuck*, under the 25 & 26 *Vict.* c. 89, s. 35, to rectify the register by omitting his name.

It appeared that he had applied for shares in *March*, 1865, and that an allotment had been made, but the applicant had repudiated his liability. His name having been inserted on the register, the company, in *August*, 1865, brought an action at law against him for the calls.

*May* 8, 24.  
Where an action is brought for calls, and in which the question whether the Defendant is or not a shareholder will be determined, this Court, on an application by such Defendant to correct the register, by omitting

his name, will postpone its decision until the result of the action is known.



1892.  
—  
APPEAL  
FROM THE  
CHANCERY  
COURT.

In November, 1892, the action was stayed, for the company to give security for costs, and no further proceeding was taken there.

Mr. Selwyn and Mr. Barburgh in support of the application.

Mr. Stoughton and Mr. Roberts, *contra*.

Mr. Selwyn in reply.

*Re South Kensington Hotel Company* (a); *Shropshire Union v. Anderson* (b); *In re The British Sugar Refining Company* (c); were cited.

#### *The MASTER of the ROLLS.*

I consider that the Lords Justices have decided this: that where an action is brought in which the question whether the Defendant is or not a shareholder will be tried, and an application is made to this Court to correct the register, this Court will suspend making any order on it until the action has been tried. I will take care that this action is tried speedily, and if the company should not give security for costs before the first day of next term, I shall know how to dispose of the application.

---

The matter stood over, the Respondents undertaking to give security in the action.

---

May 24. The security for costs having been given,

*The MASTER of the ROLLS* said the question must be tried at law.

(a) 12 *Law T.* 259.  
(b) 3 *Exch. Rep.* 401.

(c) 3 *Kay & J.* 408.

1866.

## BELANEY v. BELANEY.

**T**HIS was a special case for obtaining the opinion of the Court on the construction of the will of a testator, dated in *May*, 1865.

At the date of his will and at his death, the testator was the owner of a house and plot of ground at *Croydon* under the two indentures which are next stated.

By an assignment, dated the 27th of *July*, 1864, this property was, in consideration of 825*l.*, assigned to the testator for the residue of a term of ninety-nine years, subject to a rent of 8*l.* 2*s.* 6*d.*


The testator occupied the premises, and by an indenture, dated the 12th of *January*, 1865, and made between *Jones* of the first part, the testator of the second part, and *Cotton* (a trustee) of the third part, after reciting the lease and an agreement on the part of the testator to purchase the fee simple of the property, subject to the lease, for 220*l.*, and reciting that the testator was desirous that the term of ninety-nine years *should not merge*, and that it had been agreed that the said hereditaments should be assured in manner after mentioned, *Jones* conveyed the property to *Cotton* in fee and the rent of 8*l.* 2*s.* 6*d.* &c., to hold (subject to the lease) in trust for the testator, his heirs and assigns, and to be conveyed and disposed of as he or they should direct.

Being thus entitled to the property, the testator, on the 23rd of *May*, 1865, made his will as follows:—

“ I hereby appoint my beloved wife, *Juliana Mary Henrietta*,

*May* 25.

*A. B.*, being owner of a leasehold, purchased the reversion in fee and had it conveyed to a trustee expressly that the term might not merge. He afterwards bequeathed to his wife “ the whole of his personal property, estate and effects of every and whatsoever kind they might be :—  
*Held*, first, that the real estate did not pass; and, secondly, that the term did not attend the inheritance, but passed to the widow.

1866.  
  
 BELANEY  
 v.  
 BELANEY.

*Henrietta*, my whole and sole administratrix of this my said last will and testament. I hereby give and bequeath to my said wife *the whole of my personal property, estate and effects of every and whatsoever kind they may be* for her sole use and benefit."

The testator died on the 1st day of *June*, 1865.

The widow contended, that according to the true construction of the will, all the estate and interest of the testator in the premises, under the indentures of assignment, were effectually given and passed to her by the general gift.

The heir-at-law, on the other hand, contended, that the estate and interest of the testator under the assignment were not effectually given and did not pass to the widow, but were, or, at all events, that the reversion in fee simple expectant on the determination of the said term of ninety-nine years was, undisposed of and descended to him the heir.

Mr. *E. Charles* for the widow. Both the term and the fee simple passed to the widow, or, at all events, the term passed to her. First, this is a gift of his "personal property" and also a gift of his "estate," which latter word is unrestricted by the adjective "personal." The cases establish that the word "estate" applies both to realty and personalty and that it must have its full signification, unless express words can be found in the will shewing a contrary intention. Again, the circumstance that the word "estate" occurs in the middle of words which apply to personalty does not cut down its extended signification, if the other words are sufficient to pass the personal estate; *Terrel v. Page*(a); *Tilley v. Simpson* (b);

*Jongsma*

(a) 1 *Chanc. Cas.* 262.

(b) 2 *Term Rep.* 659, n.

*Jongsma v. Jongsma* (a); *Doe d. Evans v. Evans* (b);  
*O'Toole v. Browne* (c); *Midland Counties Railway*  
*Company v. Oswin* (d); *Noel v. Hoy* (e).

1866.  
BELANEY  
v.  
BELANEY.

Secondly, the term at least passed to the widow. It was purposely kept alive as a term in gross, and was not a satisfied term attending the inheritance; *Gunter v. Gunter* (f).

*The MASTER of the ROLLS.*

I will not trouble the Defendant on the first point, for I must strike out the word "personal" to make the will include freeholds.

The cases referred to were cases in which, after a long enumeration of particulars relating to personal chattels the word "estate" was used, and the question was, whether it was to be treated as a word *ejusdem generis*, and I am of opinion that they have no application to this case. Here the testator gives "the whole of my personal property, estate and effects of every and whatsoever kind they may be." If he intended to give her all his freehold as well as his personal estate, it was wholly unnecessary for him to insert the word "personal." If I were to hold that the word "personal" applied only to his "property" and not to his "estate," I must introduce something between the words "property" and "estate," and read it thus:—"the whole of my personal property and the whole of my estate and effects". I am of opinion that this is a gift of personal property and estate only, and that the real estate does not pass thereby (g).

Mr.

- (a) 1 *Cox*, 362.
- (b) 9 *Adol. & E.* 719.
- (c) 3 *Ell. & Bl.* 572.
- (d) 1 *Coll.* 74.
- (e) 5 *Madd.* 38.

- (f) 23 *Beav.* 571.
- (g) See *Coard v. Holderness*, 20 *Beav.* 147; *Woollum v. Kenworthy*, 9 *Ves.* 143.

*Mr. Justice* *conceded* on the second point. The term did not merge in the widow's fee. It is not merged, but it has become ~~consolidated~~ *entirely* merged with the inheritance. The testator was aware of this, and could not be called his own ~~asset~~ *asset* in as much as he did not put it to himself, and there was no reason in separating the term and inheritance separately. The rule is well shown in *Seymour's Vendors* (a), where the testator intended the inheritance; *Douglas v. Ferguson* (b); *Tyler v. Tyler* (c); *Attorney-General v. Smith* (d); *Smith v. Smith* (e); *Copel v. Girdler* (f); *Smith v. Smith* (g).

If the testator had died intestate, his widow would have been entitled to dower. The term was virtually consolidated with the fee, and descended with it on the inheritance.

#### The Master of the Rolls.

I do not dispute or doubt the authority of any of the cases cited, but I think they do not apply to this particular case. They determine that when a legal term is vested in a trustee for the person entitled to the inheritance, such person is entitled to call on the trustee to assign this term to him, and this testator might have done so.

Here the testator has taken care to preserve it as a term in gross, by having the fee conveyed to a trustee expressly in order that the term may not merge. There is no question that this term is personal estate, and the testator bequeaths the whole of his personal estate to his wife. This being personal estate at law, why

(a) Vol. 3, p. 87 (10th ed.).

(b) 1 Vern. 104.

(c) Ibid. 1.

(d) 3 Chanc. Rep. 33.

(e) 2 Atk. 67.

(f) 9 Ves. 509.

(g) 2 W.L. 29.

why is it not to pass to her? The equitable doctrine that a term is to go with the inheritance is another question; and if this testator had left the land to another person, it might be that it went with the inheritance; but he died intestate as to the inheritance. If the testator had died intestate altogether, and the question had arisen between the heir and the next of kin, I think the term would have gone to the heir; but when the testator has kept the term alive, and has given the whole of his personal estate to his widow, I think he must have intended to include the term. I am therefore of opinion that it passed to the widow.

1866.

*Belaney*  
v.  
*Belaney.*

NOTE.—The widow appealed, but the case was affirmed on both points by Lord Chelmsford, L.C., 14th January, 1867, 36 L. J. (Chanc.) 265.

**Re THE RAILWAY FINANCE COMPANY  
(LIMITED).**

**A** PETITION had been presented by a creditor to wind up this company, but, before it had been heard, the Petitioner obtained *ex parte* an order for the appointment of a Provisional Liquidator.

May 24, 28.

An order for the appointment of an Official Liquidator, obtained *ex parte* before an order to wind up the company had been made, discharged.

Mr. Southgate and Mr. Cottrell, for the company, now applied to discharge the order, contending that it was irregular to appoint a liquidator until an order had been made to wind up the company; see 25 & 26 Vict. c. 89, s. 92.

Mr. Swanston, *contrd.*

*The*

1866.

*The MASTER of the ROLLS.*

*Re*  
**THE RAILWAY**  
**FINANCE Co.**  
**(LIMITED).**

I never appoint a Provisional Liquidator until it appears that the company must be wound up.

I must discharge the order.

**EDWARDES v. JONES. (No. 2.)***June 5.*

A testator devised to each of his four daughters a house and garden at G., to be built at the expense of his executors. A daughter, M., requiring the house, one was built with a garden by D., the executor, who was also residuary legatee and devisee:—

*Held*, after the death of D., that the gift was not void, and that M. was entitled to the house and garden.

**T**HE testator, by his will dated in 1835, gave as follows:—

“Also I give, devise and bequeath unto each of my daughters *Mary Ann*, *Sarah*, *Eliza* and *Margaretta* and their heirs and assigns for ever a house and garden in the village of *Gwynfil*, free of rent, if they feel inclined to live in the said village, but not otherwise, which house or houses is or are to be built at the expense of my executors.”

The testator died in 1835.

After the testator's death, his daughter *Margaretta* and her husband requested his son *Daniel* (who was residuary devisee and legatee and also executor) to build a dwelling-house on some part of the testator's real estate in the village of *Gwynfil*, and he accordingly, in 1841-2, erected a house on the testator's estate, which was called “*Tymelin*.”

*Daniel Lewis* died in 1851, and *Margaretta* and her husband took possession of “*Tymelin*” (as they said) in 1851, but they went to reside in it in 1861. They now claimed to be entitled to “*Tymelin*.”

The

The Chief Clerk considered the devise void for uncertainty, and that "*Tymelin*" formed part of the testator's residuary estate. This was a motion to vary the certificate.

1866.  
EDWARDES  
v.  
JONES.  
(No. 2.)

Mr. Chitty for *Margaretta*. It is said that this gift is void for uncertainty, but the rule of law is this:—*id certum est quod certum reddi potest*. If the gift had been considered invalid, no inquiry would have been directed by the Court at the hearing of the cause. Time is no bar, for no period is mentioned within which the option is to be exercised; and it is not an immediate devise, but was to operate when the daughter "felt inclined to live in the said village."

He cited *Grace Marshall's Case* (a); *Hobson v. Blackburn* (b); *Jacques v. Chambers* (c); *Wood v. Drew* (d); *Duckmanton v. Duckmanton* (e); *Jarman on Wills* (f); *Coke Litt.* (g).

Mr. Everitt, *contra*, argued that the gift was too indefinite and was void for uncertainty, for the size and nature of the house and extent of the garden were undefined. Secondly, that the claim was barred by the Statute of Limitations.

He referred to *Jones v. Hancock* (h); *Jarman on Wills* (i).

*The MASTER of the ROLLS.*

I think *Margaretta* is entitled to have the certificate varied. The meaning of this devise is, that any of the daughters,

(a) *Dyer*, 281 a.

(b) 1 *Myl. & K.* 571.

(c) 2 *Coll.* 435.

(d) 33 *Beav.* 610.

(e) 5 *Hurl. & N.* 219.

(f) *Vol.* 1, p. 335 (3rd edit.)

(g) *Page* 145 a.

(h) 4 *Dow.* 145.

(i) *Vol.* 1, p. 207.



1498.  
 —  
 Rowland  
 Jones.  
 No. 2,

daughters, having a *bona fide* intention of residing in *Guyffil*, was, upon application to the executor, entitled to have a house built with a garden attached to it. It is possible, if the executor were now living, and an application were now made to him, for the first time, to have a house built with a garden attached, that he might say, "this is too uncertain: I do not know what species of house or garden you are entitled to:" on the other side, it would be said, the house and garden must be of the character usual in the village of *Guyffil*. But, however that may be, I think that the parties have themselves disposed of the question; one of the four daughters has applied to the executor to build a house, and he has built one, and has attached a garden to it. Two of the daughters are dead, having made no claim; the third is residing in the town, and the fourth makes no claim; but she may still make one. You therefore know what sort of house it must be, because the parties themselves have agreed on that, and have built one accordingly.

*Margaretta*, having a right to exercise the option, was the first person who claimed to reside at *Tymelin*, and I think that she is entitled to it in fee and for her separate use. If her husband wishes to be heard on that point, he must apply.

---

1866.

## OVERMAN v. OVERMAN.

**A** DECREE had been made in this suit, and, pending the proceedings in Chambers, the Plaintiff in *September*, 1865, transferred all his interest to trustees for the benefit of his creditors, and no proceedings had been taken since *July*, 1865.

The Defendants gave notice to the Plaintiff and the trustees, that unless they took steps to obtain an order of revivor, they (the Defendants) would do so. These parties having taken no steps, the Defendants, on the 5th of *April*, gave them notice of motion for an order of revivor under the 15 & 16 *Vict.* c. 86, s. 52.

Mr. *Chitty*, in support of the application, relied on *Noble v. Stow (a)*, and he distinguished this case from *Dendy v. Dendy (b)*. He said that a simple bill of revivor would have been sufficient before the statute, and that therefore the order asked was now authorized by the statute.

*The MASTER of the ROLLS.*

The Defendants may take an order to revive the suit, and that they may carry it on; in substance, an order like that made in *Noble v. Stow (a)*.

(a) 30 *Beav.* 512.(b) 28 *Law T. (O. S.)* 262.

*Apr.* 19. After decree, a suit became defective by the transfer of the Plaintiff's interest. The Plaintiff and his transferees having, after notice, neglected to revive, an order was made, on the application of the Defendants, for an order to revive, and that they might carry on the suit.

1866.



Jan. 30.

## HARMAN v. GURNER.

A person purchased a piece of land abutting on O. street on the east and on T. street on the west. He built two houses, one in O. street and the other in T. street, and he divided the property into two portions. By his will, he devised "all that his freehold estate situate in T. street:"—  
*Held*, that the whole property passed.

THE testator, by his will dated in 1862, devised to his son and his heirs "*all that his freehold estate situate in Three Colt Street, Old Ford, Bow*, in the county of *Middlesex*."

The testator died in 1863.

With regard to this property, it appeared that, in 1837, the testator had purchased a plot of land 134 feet by 15 feet, which abutted on *Old Ford Road* towards the east, and on *Three Colt Street* on the west. In 1838 he erected two separate houses, one fronting *Old Ford Road* and numbered No. 4, and the other fronting *Three Colt Street* and numbered 5. He divided the two gardens which were at the backs of these houses.

There was some parol evidence that the premises were called by the testator, his freehold property in "*Three Colt Street*."

The question was, whether the whole of this property passed to the son under the devise.

Mr. *Graham Hastings*, for the Plaintiff, argued, that the whole property passed, because it was not only the testator's freehold estate in *Three Colt Street*, but because that was the name by which the testator usually designated the whole of this property; *Newton v. Lucas* (a).

Mr.

(a) 6 Sim. 54, and 1 Myl. & Craig, 391.

Mr. *Dauney* in the same interest.

Mr. *Crossley* for the residuary legatee. The property in *Three Colt Street*, which exactly fits the description, alone passes. The other premises were the testator's "estate in *Old Ford Road*." The parol evidence is inadmissible. He cited *Smith v. Ridgway* (a); *Doe v. Bowen* (b); *Doe v. Brown* (c); *Jarman on Wills* (d); *Doe d. Chichester v. Oxenden* (e); *Johnson's Dictionary*, "*Estate*."

1866.  
HARMAN  
v.  
GURNER.

*The MASTER of the ROLLS.*

The only question is, what is the meaning of the word "estate?" When the testator bought this property, his estate in *Three Colt Street* consisted of this plot of land 134 feet by 15 feet, and I am required to say that I must cut down the word "estate" and to consider it "house," because he has built two houses on the property. Having this "estate" he devises "all that his freehold estate situate in *Three Colt Street*." This includes all the houses upon it. He does not designate it by the number of the house. If he had said "my freehold house numbered 5 in *Three Colt Street*," there would be something which would exclude the other house.

There is also evidence, which is admissible for this purpose, to shew that the testator always called the whole of this property "his property in *Three Colt Street*."

I think that the fact of one of the houses abutting on another street does not limit the force of the word "*estate*," and I am of opinion that the devisee is entitled to the whole property and the houses on it.

(a) 1 *Law Reports (Ex.)* 46.

(d) *Vol. 1, p. 753.*

(b) 3 *Bern. & Ad.* 453.

(e) 3 *Taunt.* 147.

(c) 3 *Maulc & Sel.* 171.

1866.

JOHNSON v. THE EDGWARE, &c. RAILWAY  
COMPANY and Others.

Feb. 15, 23.


A landlord was empowered to resume possession of any part of the land demised, in case it should be required by him "for the purpose of building, planting, accommodation or otherwise:"—  
*Held*, that this did not entitle the landlord to resume possession of land required by a railway company, so as to defeat the tenant's right to compensation:—*Held*, also, that the word "otherwise" was to be read as being *ejusdem generis*.

THIS company obtained its act of parliament in 1862, and shortly afterwards (16th August, 1862), Mr. Cooper granted to the Plaintiff, *Johnson*, a farming lease of a farm of 218 acres, through which the railway was to pass, for a term of twenty-one years, determinable at the option of the landlord at the end of fourteen years. The lease contained the following proviso:—

"Provided always and it is hereby agreed, that in case any portion or portions of the said demised lands shall be required *for the purpose of building, planting accommodation or otherwise*, or for the purpose of working the clay, sand or gravel, in, under or upon the same, by *E. P. Cooper*, his heirs or assigns, or his or their tenants, before the expiration of this demise, it shall be lawful for *E. P. Cooper*, his heirs or assigns, to resume and take any such portion or portions accordingly, on giving to *Johnson*, his executors or administrators, three calendar months' previous notice of his intention so to do, such notice to expire at any time during the year, and *E. P. Cooper* is thenceforth, during the term hereby granted, determinable as hereinafter mentioned, to allow *Johnson*, his executors or administrators, out of the rent hereby reserved, 3*l.* 10*s.* per acre, and so in proportion for a greater or less proportion than an acre, for so much of the said land as shall be so resumed and taken under the present proviso."

The railway company required 2*A.* 3*R.* 6*P.* of the farm for their railroad, which went through the middle of it  
 and

and necessarily interfered with its convenient cultivation. On the 23rd of *April*, 1863, the company served the Plaintiff with the usual notice to treat, and on the 17th of *September*, 1863, they agreed to give him 270*l.* for purchase-money and compensation. This was, however, done on the Plaintiff's representation that he had an absolute term of twenty-one years in the farm.

1866.  
  
 JOHNSON  
 v.  
 THE  
 EDGWARE, &c.  
 RAIL. Co.  
 and Others.

The company proceeded to treat with the landlord, Mr. *Cooper*, for his interest, and they became acquainted with the facts of his right to resume the land under the above proviso. On the 4th of *March*, 1864, Mr. *Cooper* gave *Johnson* a written notice that the 2*A.* 3*R.* 6*P.* of the farm "were required by him for the purposes, or some or one of them, in the lease mentioned, and that it was his intention to resume and take such portions of the said demised lands *on or after the 5th day of June* next ensuing the day of the date thereof."

On the 18th of *August*, 1864, a jury assessed the amount payable by the company to Mr. *Cooper* for the purchase of his interest at 3,000*l.* and one shilling for damages.

The company having refused to pay the Plaintiff any compensation, he, on the 5th of *December*, 1864, instituted this suit against the company and (by amendment) against the representatives of the lessor for an injunction to restrain the company from taking or keeping possession of the land until they had paid the Plaintiff, and that the fair compensation might be assessed and paid to the Plaintiff by the company, or for the specific performance of the agreement of the 17th of *September*, 1863.

Mr. *Selwyn* and Mr. *Bagshawe*, for the Plaintiff,  
 VOL. XXXV—III. I I argued,

1866.  
  
 JOHNSON  
 v.  
 THE  
 EDGWARE, & C.  
 RAIL. CO.  
 and Others.

argued, first, that the lessor had no power, under the proviso, to retake the land for the purpose of selling it again to the company, for that could not be called a taking "for the purpose of building or plantation" of the lessor; and that the words "or otherwise" were not general, but were restricted to purposes like those already specified, and were *ejusdem generis*. Secondly, that this could not be done so as to affect the Plaintiff's rights after the notice to treat and the contract between the railway company and the tenant. And thirdly, that the notice to resume possession "on or after the 4th day of June" was informal and insufficient. They cited *The Metropolitan Railway Company v. Woodhouse* (a); *Williams v. Golding* (b); *Harrison v. Blackburn* (c); *Sandiman v. Breach* (d); *Haynes v. Haynes* (e); *Re Arnold* (f).

Mr. *Bristowe*, for the representatives of the lessor, argued that these Defendants had no interest in this question. He said that the finding of the jury had been framed so as not to affect the Plaintiff's right, but that the formation of a railway and making a station might properly come within the word "accommodation" to the lessor and his farm.

Mr. *Daniel* and Mr. *T. Stevens* for the railway company. When the company entered into the agreement of the 17th *September*, 1863, they were misled by the statements of the Plaintiff as to his interest in the land. They supposed that he had an absolute term of twenty-one years, but it turned out that he had only a term of thirteen years, and that even this was determinable and had been determined by notice from the lessor. This agreement

(a) 11 *Jur.* 296.

(b) 1 *Law Rep. (C. P.)* 69.

(c) 17 *C. B. Rep. (N.S.)* 678.

(d) 7 *Barn. & Cr.* 96.

(e) 1 *Drew. & S.* 426.

(f) 32 *Beav.* 591.

agreement cannot therefore be enforced as it stands, though the company are content to carry it out with an abatement in the price. They have never repudiated the agreement, but they say that, by subsequent events, consequent on facts of which they were not aware, the Plaintiff has become a mere tenant at will or by sufferance, that his interest has been reduced to nothing, and, therefore, that he is entitled to no compensation. The 3,000*l.* was assessed as the amount of compensation on the basis of the Plaintiff's having no interest, and the question therefore really is one between the landlord and the tenant as to their rights in that sum.

1866.  
  
 JOHNSON  
 v.  
 THE  
 EDWARDS, &c.  
 RAIL. Co.  
 and Others.

Mr. *Bagshawe* in reply.

---

*The MASTER of the ROLLS*, after stating the facts of the case, said,—

A good deal might turn on the validity of the notice given by the landlord on the 4th of *March*, 1864. The proviso requires (assuming that the landlord had the power to give it) “three calendar months’ previous notice of his intention so to do, such notice to expire at any time during the year.” But this is a notice to take the land *on or after the 5th of June* next; and if he did not take it on the 5th of *June*, it is difficult to say when he would, for there is nothing to define when he was to take it after the 5th of *June* next. But it is not necessary to decide that point, because I am of opinion that the case does not come within the proviso.

Feb. 23.

It is necessary to refer to what afterwards took place, which was this:—the railway company, having, by various letters, thought fit to say to the Plaintiff, “you have no interest whatever in this land; we will not perform our



1864.  
 JAMES  
 v.  
 THE  
 GREAT NORTHERN  
 RAILWAY CO.  
 and Others

COOPER WILL FILE AND YOU have no right to compensa-  
 tion." WILL DELIVER A JURY. IN August, 1864, to assess the  
 compensation payable to Mr. Cooper. They gave notice,  
 it is true to the Plaintiff, that if he liked to go before  
 the jury and make a claim he might, but he very wisely  
 did not think fit to do so or make any claim at all. The  
 jury, as far as I can judge from the evidence, assessed  
 the value of the fee simple in possession of the eight  
 acres belonging to Mr. Cooper, including therein the two  
 acres and three-quarters which were in the Plaintiff's  
 occupation, at a sum of 3,000*l.*, and it is clear, upon the  
 evidence, that this was for the fee simple with the pos-  
 session delivered up at once. Thereupon the Plaintiff,  
 being dissatisfied, called upon the railway company to  
 compensate him, which they declined to do, and the  
 Plaintiff filed this bill on the 5th of *December*, 1864.

I must refer to this proviso again, and state why I do  
 not think it applies to this case. In the first place, it is  
 to be observed, that all deeds are to be construed most  
 strongly against the grantor. Next, it is also to be ob-  
 served, that the railway company had obtained their act  
 just before the contract with the Plaintiff was entered  
 into, which was on the 18th of *August*, 1862, so that  
 both the Plaintiff and Mr. Cooper, the lessor, knew  
 perfectly well that this act had passed and that the rail-  
 way was to pass through the farm, for they had received  
 the usual preliminary notices. Knowing this, Mr. Cooper  
 demises the farm to the Plaintiff for seven, fourteen or  
 twenty-one years, determinable, if he pleases, at the end  
 of the first fourteen years, with this proviso:—"Provided  
 always" &c. &c. Now does the case come within that  
 proviso? This bit of land is clearly not required either  
 "for the purpose of building or planting." Then is it  
 required for the purpose of "accommodation"? In my  
 opinion it is not, for I understand the word "accom-  
 modation"

modation" to mean something of this nature, *e. g.* :—if the lessor had built a house, and wanted to make a road to get access to it, and required this land for that purpose, that might properly be called "accommodation," or if he wanted to add a small piece on to his garden or the like, that again might be called "accommodation." But if a third person said to him, "I should like to buy a piece of this land to make a railway upon it," that would not be an accommodation to the lessor, though it might be an accommodation to the railway company. But even then it would not be an accurate expression, for it would, in fact, be a perfectly distinct thing; it would be required for the purpose of alienation, and if he might require this bit of land for that purpose, he might require the whole farm. Accommodation means "accommodation to Mr. *Cooper*, his heirs and assigns," for the purpose of more usefully and beneficially occupying and enjoying the land itself; and that expression does not, in my opinion, extend to the selling of two and three-quarter acres to a railway company; the more so, because both parties well knew at that time that the railway was coming across the farm; and if they intended the proviso to meet that case, why did they not introduce the proper expression for that purpose, and not leave it altogether vague?

I am, therefore, of opinion that this grant, which must be taken most strongly against the lessor, does not authorize him to retake the property for the purposes of the railway company. I am also satisfied that no ordinary person would suppose, on reading a proviso in a lease, saying, that if a portion of the land was wanted by the lessor "for building, planting or accommodation, it might be resumed," the tenant was bound to allow a railway to go through the farm and receive no compensation for the damage it occasioned him by what is commonly

1866.

JOHNSON

v.

THE  
EDGWARE, &c.  
RAIL. Co.  
and Others.

1866.  
  
 JOHNSON  
 v.  
 THE  
 EDGWARE, &c.  
 RAIL. Co.  
 and Others.

commonly called "severance," and which, in fact, would produce a much more serious inconvenience to the tenant than any building or planting by or accommodation to the landlord.

Having come to that conclusion, it remains to consider whether this case comes within the words "or otherwise;" and I think it is quite clear that it does not. It cannot be denied, that where a person speaks of three purposes, "A., B. and C. or otherwise," the latter words refer to something *ejusdem generis*, and can only be applicable to things of the same character as those previously specified, or, in this case, something of the same character, as "building, planting or accommodation," though not coming precisely within the exact definition of those words. I am of opinion, therefore, that the case does not come within the words "or otherwise;" and it is quite clear that it does not come within any other part of the proviso relating to "clay, sand or gravel." Having come to that conclusion, I am of opinion that the notice of the 4th of March, 1864, was invalid, and that Mr. Cooper had no power to resume this land. He did not want it for the purpose of an accommodation at all, but he wanted it in order to obtain from the company that compensation which, if he had not interfered, would have been paid to his tenant. The clause cannot mean this:—that if some third person should want to buy this land and to make a railway across the farm, I (the landlord) will have the compensation for the damage done to you (the tenant), and I will resume it for that purpose. This clause was introduced *bonâ fide* for the better enjoyment of the land itself, and not for the purpose of depriving the tenant of that compensation which he would naturally have a right to demand from the railway company for the injury done to him.

I have

I have now to consider what is the consequence of that conclusion. The railway company have paid the 3,000*l* 1*s*. to Mr. *Cooper* for the whole of this land, and the Vice-Chancellor Sir *William Page Wood* being of opinion, and, as it appears to me, very wisely, that he could not dispose of the question in the absence of the lessor, as he was materially interested in this matter, and might be seriously affected by any decision made in his absence, the case stood over, and the landlord has been made a party.

1866.

JOHNSON  
v.  
THE  
EDGWARE, &c.  
RAIL. CO.  
and Others.

In the first place, the Court cannot now grant any injunction; for to stop this railway on account of this mistake is quite out of the question, and the only point then is, what compensation the Plaintiff is entitled to? I have held that the company have taken two acres and three-quarters acres, of which the Plaintiff was the tenant for thirteen years certain, for, holding that the landlord could not properly give the notice under that proviso at that time and for that purpose, it must necessarily follow that he could not do so at a later period during the fourteen years. I must therefore, for this purpose, hold that the Plaintiff was absolutely entitled to the land for fourteen years, and that he is entitled to compensation for that term. But then I cannot divide the compensation of 3,000*l*. already paid, for I have no power to deal with that. The railway company, as I understand, are willing to be bound by the agreement they have entered into with the Plaintiff; and, if that be so, I am disposed to think that, as the Plaintiff entered into that agreement on the assumption that he had twenty-one years certain, and as it turns out that he had only fourteen, I should, if the railway company agreed to pay him the 270*l*., hold him bound to accept it; for I do not think he could claim anything beyond that. But if that should not be so, the only  
course

1872.  
 ~~~~~  
 JAMES
 v.
 THE
 LONDON & N.
 RAIL CO.
 and Others.

course I can take is, to direct a reference in Chambers to ascertain the proper amount payable to the Plaintiff.

I am also of opinion that the Plaintiff is entitled to the costs of the suit: for in my opinion he was not, but both the Defendants were, in the wrong. The landlord was mistaken in supposing he could resume the property, and the railway company were wrong, because they had notice of the lease and the proviso before they assessed the compensation payable to Mr. *Cooper*, and they were therefore wrong in acquiescing in the landlord's construction of the proviso. The railway company might have said—as indeed they seem disposed to say now—at the hearing, “this is an affair with which we have no concern; it is for you, the landlord, on one side and the tenant on the other to fight it out, the only question being, which of you is entitled to this 270*l.* for compensation?” If the railway company had thought fit to say, “if you cannot agree and settle the matter between yourselves, we shall file a bill of interpleader and pay the money into court, in order that you may settle your dispute,” I should have held that they were justified in taking that course, and should have allowed them their costs as against the party who failed. But instead of doing so, they have adopted the view of the landlord, which in my opinion was a mistaken one, and I am therefore of opinion that the railway company must pay the Plaintiff's costs of suit.

I cannot give the landlord any costs; he was in the wrong, and he was a necessary party.

I do not see how I can settle the matter of difference which will probably arise between the railway company and the landlord. If they will consent, then of course I can easily make an order to ascertain how much of the
 3,000*l.*

3,000*l.* ought properly to be paid to the Plaintiff, but I can only do this by consent.

1866.

JOHNSON

v.

THE
EDGWARE, &c.
RAIL. Co.
and Others.

The only compulsory order which I can make is, to refer it to Chambers to ascertain the amount of compensation to which the Plaintiff was entitled when the land was taken, and to direct the railway company to pay him the amount with interest at four per cent., together with the costs of suit.

SHATTOCK v. SHATTOCK.

Feb. 9, 12, 13.

Apr. 23.

IN this case, some real and personal property was settled on the marriage of Mr. and Mrs. *Rowcliffe* in 1807, upon trust for the separate use of Mrs. *Rowcliffe* for her life, and after her decease for the children of the marriage [which limitation failed], and for default of such issue, then upon the following trusts:—

Property was settled on a *feme covert* for her separate use for life, with a power to appoint it by deed or will.

“ Upon trust for such person or persons, for such estate or estates, interest or interests, and in such parts, shares or proportions, and charged with such annual or other sums of money, upon such conditions, with such restrictions and limitations over, and in such manner and form, as *Elizabeth Shattock*, notwithstanding her said intended coverture, by any deed or deeds, instrument

She executed the power by will:—*Held*, that the appointed property was not liable to pay a promissory note signed by her.

A married woman cannot or bind herself by contract, but

Equity holds that she may, by contract, bind her separate estate. Her separate estate will be liable to pay any debt of hers which she has secured by writing. Equity has also *held*, that it is sufficient if it be shewn that the married woman verbally promised that her debt should be paid out of her separate estate.

The separate property of a married woman is not, after her death, liable to pay her general debts either in the case of her having been absolutely entitled to the property, or of her having only a life estate with a power to dispose of it by deed or will.

The principle of Courts of Equity is, that, as regards her separate estate, a married woman is a *feme sole*, and can act as such; but this is only so far as is consistent with the other principle, viz., that a married woman cannot enter into a contract.

In the administration of the separate estate of a married woman after her decease, the debts are to be paid in order of priority and not *pari passu*.

WILL.
 ———
 SHATTUCK
 +
 SHATTUCK.

OF TESTAMENTS IN WRITING, WITH OR WITHOUT POWER OF REVOCA-
 TION, TO BE SIGNED AND DELIVERED BY HER IN THE
 PRESENCE OF AND ATTESTED BY TWO OR MORE CREDIBLE WIT-
 NESSES. IF BY HER LAST WILL AND TESTAMENT IN WRITING, OR
 ANY WRITING PURPORTING TO BE SUCH, IF ANY COVE-
 NANTS HEREIN, TO BE RESPECTIVELY SIGNED AND PUBLISHED
 BY HER IN THE PRESENCE OF AND ATTESTED BY THREE OR MORE
 CREDIBLE WITNESSES. AND WHATEVER LAST-MENTIONED DEED
 WRITING, WILL OR COVE-
 NANT, IF WRITING PURPORTING TO BE SUCH
 WILL OR COVE-
 NANT, AND A SACH WILL OR COVE-
 NANT, IF WRITING
 PURPORTING TO BE SUCH WILL OR COVE-
 NANT, ONE OR MORE EXE-
 CUTOR OR EXECUTORS, THE SAID *Elizabeth Shattuck* was
 thereby and by the said *William Rowcliffe*, her said
 then intended husband, enabled and empowered to
 MAKE AND APPOINT, SHOULD FROM TIME TO TIME DIRECT,
 LIMIT OR APPOINT, AND IN DEFAULT OF AND UNTIL SUCH LAST-
 MENTIONED DIRECTION, LIMITATION OR APPOINTMENT, AND UNTIL
 SUCH ESTATE AND ESTATES, INTEREST AND INTERESTS SO DIRECTED,
 LIMITED OR APPOINTED SHOULD RESPECTIVELY END AND DE-
 TERMINE, AND AS TO SUCH PARTS OF THE SAME HEREDITA-
 MENTS, MONEYS AND PREMISES, WHEREOF NO SUCH DIRECTION,
 LIMITATION OR APPOINTMENT, AS LAST MENTIONED, SHOULD BE
 MADE, THEN TOGO TRUST, AS TO THE SAID FREEHOLD HEREDITA-
 MENTS, FOR THE SAID *Elizabeth Shattuck*, her heirs and
 assigns, FOR EVER: AND AS TO THE SAID PRINCIPAL AND IN-
 TEREST, MONEYS AND SECURITIES, UPON TRUST FOR SUCH PERSON
 OR PERSONS AS WOULD BE NEXT OF KIN OF THE SAID *Elizabeth
 Shattuck*, AND ENTITLED THERETO UNDER THE STATUTE FOR DIS-
 TRIBUTION OF INTESTATE'S EFFECTS, IN CASE SHE HAD DIED SOLE
 AND UNMARRIED, AND TO AND FOR NO OTHER USE, TRUST, INTENT
 OR PURPOSE WHATSOEVER."

There was no issue of the marriage, and Mrs. *Row-
 cliffe* died *coverte* in 1823, having appointed the prop-
 erty by her will. The question was, whether the
 appointed property was liable to pay a promissory note
 signed

signed by her, but not witnessed. The facts are more fully detailed *post* in the judgment of the Court.

1866.

SHATTOCK
v.
SHATTOCK.

Mr. *Jessel* and Mr. *F. H. Colt*, for the claimant under the promissory note, cited *Vaughan v. Vanderstegen* (a); *Hobday v. Peters* (b); *Johnson v. Gallagher* (c); *Allen v. Papworth* (d); *Hulme v. Tenant* (e); *Heatley v. Thomas* (f); *Owens v. Dickenson* (g); *Norton v. Turvill* (h); *Taylor v. Meads* (i); *Blatchford v. Woolley* (k); *Sugden's Powers* (l).

Mr. *Southgate* and Mr. *Langley*, for the Plaintiffs, cited *Tullett v. Armstrong* (m); *Jacob v. Husband and Wife* (n); *Lee v. Muggeridge* (o); *Murray v. Burlee* (p).

Mr. *Freeman*, Mr. *B. B. Rogers*, Mr. *Martineau* and Mr. *E. K. Karlake* for other parties.

Mr. *Jessel*, in reply, referred to *Sockett v. Wray* (q).

The MASTER of the ROLLS.

The question raised in this case is one of considerable importance; it is this:—whether an estate which is limited to the separate use of a *feme covert* for her life, with a power to her to appoint it either by deed or will, is liable, after her death, to be applied in payment of the general debts incurred by her, when she has exercised the power by her will.

Apr. 23.

In

- (a) 2 *Drewry*, 165.
- (b) 28 *Beav.* 354.
- (c) 30 *L. J. (Chanc.)* 298.
- (d) 1 *Ves. sen.* 163.
- (e) 1 *Bro. C. C.* 16.
- (f) 15 *Ves.* 596.
- (g) *Craig & Ph.* 48.
- (h) 2 *Peere Wms.* 144.
- (i) 34 *L. J. (Chanc.)* 203.

- (k) 2 *Drewry & Sm.* 204.
- (l) *Page* 476 (8th edit.)
- (m) 1 *Beav.* 1, and 4 *Myl. & Cr.* 377.
- (n) *Vol.* 2, page 243.
- (o) 1 *Ves. & B.* 118.
- (p) 3 *Myl. & K.* 209.
- (q) 4 *Bro. C. C.* 484.

NEW.
 ~~~~~  
 SHATTUCK  
 v.  
 SHATTUCK

In this case the married woman, *Elizabeth Shattock*, afterwards *Bancroft*, had her property settled on her marriage with *William Bancroft* in October, 1807, in the following manner:—the real estate and personal property therein mentioned was conveyed and assigned to *John Shattuck* and *Robert Benson*, their heirs, executors, administrators and assigns for ever, upon trust for *Elizabeth Shattuck* absolutely until the marriage, and after the alienation thereof, subject to certain directions respecting a sum of £1,000 therein particularly mentioned. It was that *John Shattock* and *Robert Benson* and the survivor of them, his heirs, executors and administrators, should stand seised and possessed thereof, it was for the sole and separate use of *Elizabeth Shattock* for her life, exclusively of her husband, and from and after her decease, upon trust for the children of the marriage as she should appoint, and in default amongst them equally, and for default of such issue, upon trust for such person or persons, for such estates and interests, upon such conditions, and with such instructions and in such manner and form as *Elizabeth Shattock*, notwithstanding her coverture, should by deed or will appoint, and in default of such appointment, upon trust as to the freehold hereditaments for the said *Elizabeth Shattock*, her heirs and assigns for ever, and as to the personal moneys and securities, upon trust for such persons as would be the next of kin of the said *Elizabeth Shattock* under the Statute of Distributions, in case she had died sole and unmarried.

By the same indenture, *Elizabeth Shattock* assigned to the same trustees all her household goods and implements to hold upon the like trusts as were before expressed concerning the hereditaments, moneys and securities, or as near thereto as the different nature of the property would admit.

In

In *February*, 1808, Mr. and Mrs. *Rowcliffe* agreed to live apart, and Mrs. *Rowcliffe* settled 150*l. per annum* permanently on her husband; and in *August*, 1808, a deed, regulating the terms of their separation, was duly executed.

1866.  
  
 SHATTOCK  
 v.  
 SHATTOCK.

In *August*, 1820, Mrs. *Rowcliffe* executed the power of appointment contained in the marriage settlement in favor of *John Shattock*, her brother, for 610*l.* In *November*, 1822, she duly executed her last will, whereby she executed the power contained in the marriage settlement, and disposed of the remainder of her property in the manner therein specified, and she appointed *Stephen Bridge* and *Joseph Yates* executors of her will.

A few months afterwards, in *March*, 1823, she died, without having altered her will, leaving her husband, *William Rowcliffe*, surviving her, and without having had any child of the marriage. Administration with the will annexed was granted to *Stephen Bridge*.

In 1824, the suit of *Bridge v. Rowcliffe* was instituted to administer the trusts of the will and execute the trusts of the settlement. Various proceedings took place in that suit, and under it *William Rowcliffe* was put into possession during his life of certain personal property belonging to his wife, in order to secure the annuity of 150*l. per annum* before mentioned. He died in *January*, 1864, and there is now a sum of 2,440*l.* consols standing to the credit of that cause, which represents what was formerly the separate property of Mrs. *Rowcliffe*. The bill in this cause was filed in *December*, 1864, praying, by way of supplement to the former suit, that the trusts of the settlement of *October*, 1807 and of the will of *Elizabeth Rowcliffe*, so far as they remain unperformed, might be carried into execution.

Mr.



debts and obligations after her decease is the question to be now determined. It is therefore unnecessary to consider here any question as to the liability of her separate estate during her life. So treating the subject, it will be proper to consider it—first, where the married woman has an absolute interest in the property settled to her separate use; and, secondly, where she has only a limited interest with a power of disposing of the rest of the property after her death. In the first instance, the law now, as administered by Courts of Equity, seems to be settled to this extent:—that her separate property will be liable to pay any debts of hers which she has secured by any writing, the Courts holding that giving such a writing as a security for the debt must have a meaning, and that, unless the meaning be to charge her separate estate, there is no meaning whatever in the writing, which, without it, is a mere piece of waste paper. Equity has also held, that it is sufficient if it be shewn that the married woman verbally promised that her debts should be paid out of her separate estate. All these cases rest on contract either expressed or implied; but whether the existence of the contract is necessary—whether the separate estate of the married woman would, after her death, be liable to pay the debts due to her general creditors, who could not allege that she had entered into any contract with them on the subject, is a matter of much importance. It has a direct bearing on this case, and it is one on which the decisions are conflicting.

The second case, where property is settled upon a married woman for life, with a power of disposing of it, may be considered under three heads.

First, when the married woman has the power of disposing of the property by deed only; secondly, where she

1866.

SHATTOCK  
v.  
SHATTOCK.

the law the power of disposing of it by deed or will; and secondly, where she has the power of disposing of it by will only. Each of these is of course divisible into two cases, first, when she has not secondly, when she has not exercised the power.

The first is very simple. If she has exercised the power by deed, it takes effect according to the deed, and if she has not exercised the power, it goes as in default of appointment.

In the second, where the married woman has power of disposing of the property by deed or will and does not exercise the power, it is not quite clear that her creditors can take nothing, and the property goes as in default of appointment. Her exercise of the power by deed during her lifetime takes effect of course according to the tenor of the appointment, and lets it to the issue; but her exercise of the power by will, when she has the power to dispose of it by deed or by will, raises the question now before me, that is, whether the fact of exercising such power of appointment lets in her general creditors to require payment out of that property, although they are not directly *appointees* of the property; that is, where they cannot claim it under the words of the will. Of course, if this were the property of a man, it would become assets for the payment of his general creditors; this has been decided in *Jenney v. Andrews* (a), and in many other cases. But whether, in the case of a married woman, the appointment lets in her general creditors to be paid out of it, appears to me to depend on exactly the same principle as whether the separate property to which a married woman

(a) 6 *Mad.* 264.

woman was entitled absolutely becomes, after her death, assets applicable to the payment of her debts generally. And this appears to me to depend upon the answer to be given to this question, viz., whether the doctrine of the Courts of Equity on this subject is, that when a married woman has separate estate she stands in the same position as if she were a *feme sole* generally. In other words, whether any contract she has entered into is a binding contract, provided it can be satisfied out of her separate estate, though entered into without knowledge of, or upon the faith of, such promise for its fulfilment, or, on the other hand, whether the capacity of acting as a *feme sole*, by a married woman having separate estate, is confined to the property itself and to acts done by her in respect of, and in regard to, the property itself. The difference is most material, and the cases on this subject are not easily to be reconciled in all respects.

1866.

SHATTOCK  
v.  
SHATTOCK.

After giving the case the best consideration I can, and reading over all the cases I can find on the subject, I have come to the conclusion that the only mode of reconciling the greater mass of the authorities with each other, and, which is still more important, of reconciling them with the fundamental principles regarding married women, is to answer in the affirmative the second branch of the question I have stated, that is, to hold, that such separate property is not, after the death of the married woman, liable to pay her general debts, either in the case of having been absolutely entitled to the property, or her having only a life estate with a power to dispose of it by deed or will and having exercised that power by will.

The principle of the Court of Equity which relates to this subject in my opinion is, that, as regards her separate estate, a married woman is a *feme sole*, and can

**THE**  
**—**  
**RECORDS**  
**&**  
**REVENUE**

act is such, that this is only so far as is consistent with the other principle, viz. that a married woman cannot enter into a contract. These principles are reconciled in this way:—Equity attaches to the separate estate of the married woman a quality incidental to that property, viz. a capacity of being disposed of by her; in other words, it gives her a power of dealing with that property as she may think fit. But the power of disposition is confined to the property, and the property must be the subject matter that she deals with; and therefore, if she makes a contract, the contract is nothing, unless it has reference directly or indirectly to that property. This is, in my opinion, the extent of the doctrine of equity relating to the separate estate of a married woman. It is on this principle that every bond, promissory note and promise to pay given by a married woman has, for the reason I have already stated, been held to be a charge made by her on her separate estate; that is to say, it is a disposal of so much of her property, the whole of which, if she pleased, she might give away. But if equity goes beyond this, it appears to me that it is laying down this principle: that when a married woman has separate estate, she may bind herself by contract exactly as a *feme sole*; or, in other words, that the possession of separate property takes away the distinction between a *feme covert* and a *feme sole*, and makes them equally able to contract debts. It is clear that this implication of a charge cannot exist in the mere case of simple contract debts without a word said or written to shew that the separate property is to be bound.

It is proper to point out, before going further in the discussion of the authorities, the manner in which the case before me must be governed by the conclusion to be come to in the case where the liability of the separate property

property of a married woman, in which she had the absolute interest, to pay her general debts is to be determined. If, in that case, the married woman had given a promissory note, it would have been a charge upon her separate property, for the reason I have already stated, and because, as she had the absolute interest in it, she had a power to charge her separate property after her death in any way she pleased, and might do so by a promissory note; but when she is entitled for life only and can only charge the property after her death by deed or will, the promissory note, being neither a deed nor a will, has no effect in charging the property after her decease. During her life it would be a charge upon her life estate, because she could so bind her life estate, but when the life estate had no longer any existence, the note constitutes no charge on the property at all.

1866.

SHATTOCK  
v.  
SHATTOCK.

After a careful examination of the authorities on this subject, I do not think that I should have hesitated long in the conclusion to which I have come had it not been for the learned and elaborate judgment of Lord Justice *Turner* in *Johnson v. Gallagher* (a), in which he came to an opposite conclusion. On reading that judgment, it seems to me that he was of opinion that the leading case on this subject was *Hulme v. Tenant* (b), and that this decision laid down the proposition broadly in favor of his view. The case itself, as reported in *Bro. C. C.* (c), came twice before the Court, and is so reported as to give a foundation for either view of the case. As I considered the case originally, it appeared to me that the principle as laid down by Lord *Thurlow* in that case was, that a *feme covert* could act with respect to

(a) 30 *L. J. (Chanc.)* 298.(c) *Page* 16 (vol. 1).(b) 1 *Bro. C. C.* 16.



1861  
—  
Sutton  
2  
Hawthorn



if her separate property be a *feme sole*, but, if without prejudice to her separate property, she entered into an engagement which would bind a *feme sole*, this would have in effect in her or in her property. The Lord Justice Turner in his judgment in *Johnson v. Galway* &c. considered that Lord Thurlow distinctly laid down the doctrine, that is, that the separate estates of married women were liable for their general engagements. When I refer to the report itself, I find that on the first occasion Lord Thurlow uses these words — "It is not like the case of an infant, who is incapable of acting: but, in respect to a *feme covert*, notwithstanding what seems to go thus far: that the general engagements of the wife shall operate upon her personal property, shall apply to the rents and profits of her real estate, and that her trustees shall be obliged to apply personal estate and rents and profits, when they arise, to the satisfaction of such general engagements." On the second occasion the reporter, Mr. Brown, was not present, he reports it *ex relatione* and very shortly, and so reported it does state the proposition as noticed by Lord Justice Turner. I doubt whether both are reconcilable: but the decree is not to the effect stated in the second part of the Report, for the decree merely affects the rents of the wife's separate estate, which were settled for her separate use without any restraint upon anticipation, and as the wife had joined in one bond and had alone given the other bond, it was clear that she thereby intended to bind her separate estate, and that she did bind it to the extent of her power. Therefore Lord Thurlow's decree was clearly right on the facts, without resorting to the doctrine, that the general debts of a *feme sole* could be paid out of her separate estate. I must therefore consider the case of *Hulme v. Tennant*

as only an authority for the principle as I have stated it, and that it is in this limited form that it is confirmed by Sir William Grant in *Heatley v. Thomas* (a); that is, that the engagement need not be in writing, but it must be proved that it was entered into with an intention on her part of making her separate estate liable to discharge that debt, and this intention will be inferred from the mere circumstance of contracting the debt. When I say that the engagement need not be in writing, of course there is this qualification :—that if the separate property of the married woman consist of real estate only, the Statute of Frauds applies as in every other case affecting land ; but if she have an absolute interest in personalty settled to her separate use, then a verbal engagement that her personal estate shall be liable to pay the debt will bind it.

On referring to the other case I find two, and I think only two, which support the doctrine that separate estate of the married woman is liable to pay her general debts, for in *Field v. Sowle* (b), on which the Lord Justice Turner relies, Sir John Leach treats the debt only as an equitable appointment. But the two cases to which I refer confirm the doctrine laid down by Lord Justice Turner only indirectly ; these are, *Anon.* (c), the proper name of which appears to be *Bruere v. Pemberton*, and *Gregory v. Lockyer* (d). These are cases of the administration of the separate estate of a married woman after her decease, and it appears that the debts were paid *pari passu*, which obviously is inconsistent with the doctrine of paying out of the separate estate only those debts which are charged upon it, as, in that case, they must be paid according to their priority ; but I do not find that

1866.

SHATTOCK  
v.  
SHATTOCK.

(a) 15 Ves. 596.  
(b) 1 Russ. 82.

(c) 18 Ves. 258.  
(d) 6 Mad. 90.

1867.  
 CHARTER  
 2  
 CHARTER

THE ONE POINT WAS ARGUED before the Court, and this issue of administration seems to me to have been taken inadvertently. The Lord Justice *Turner* seems to consider that in the case of *Tanghien v. Vanderstegen* (a), where Vice-Chancellor *Kindersley*, the principle he lays down was adopted and acted upon. But I do not so understand it. In *Tanghien v. Vanderstegen* the Vice-Chancellor decided that a married woman, having a life estate in personality in her separate use with a general power of appointment by will, does not, by exercising that power, make the property applicable to the payment of her engagements in the nature of debts, viz., of such engagements as would be charges on her separate estate, and in support of this he uses these words:—

“The appointees resist this claim on several grounds. They insist that the principle is not applicable even in the case of a man where (as in the present case) the power is not only to be exercised by will and not by deed. No authority whatever is adduced in support of this proposition. It is admitted that if the power authorizes its being exercised by deed or will and the donee exercises it by will, the principle will apply. Now it is not the mere possession of the power but the exercise of the power which can ever give occasion to the application of the principle, and if it will be applied at all where the power is exercised by will, I do not see what difference it can make whether the power did or did not authorize the exercise by deed as well as by will.” Therefore it is clear, in the view of Vice-Chancellor *Kindersley*, that this case must be decided exactly the same, whether the married woman had power to dispose of the property by deed or will or by will only, provided she exercised the power by will. I agree with everything the Vice-Chancellor has said in that case with respect to the execution of powers.

The

The result is, that, in my opinion, the rule is that the liability of the separate estate of a married woman is only created by something which operates as a specific charge upon it, and that this charge can be produced only by an intention on the part of the married woman to create such a charge.

1866.

SHATTOCK  
v.  
SHATTOCK.

I adopt the expression of the Vice-Chancellor Sir *John Leach*, in *Stuart v. Kirkwall* (a), viz., "that a *feme covert* being incapable of contract, this Court cannot subject her separate property to general demands, but that, as incident to the power of enjoyment of separate property, she has a power to appoint it, and that this Court will consider a security executed by her as an appointment *pro tanto* of her separate estate." The only alteration I should wish to make would be, to substitute another word for the word "appointment," because it is not the execution of a power, it is a disposal *pro tanto* of her separate estate, which she has the power of disposing of.

I do not think it necessary to cite in detail the other cases, all of which I have carefully examined and, as they appear to me, support the view I have stated. I think, as I have stated, that this view is taken by the Vice-Chancellor *Kindersley* in *Vaughan v. Vanderstegen*, and by me in following that decision, and it appears to me to be the only mode by which the authorities can be reconciled with principle.

It follows, of course, in my opinion, where a married woman has an estate for life only and a power of disposition after her decease, by will only, that this separate property will not, after her decease, be liable to pay her general creditors, and also that in the administration of the separate estate of a married woman after her decease,

the

(a) 3 *Madd.* 387.

1866.

SHATTOCK

v.

SHATTOCK.

the debts are to be paid in order of priority and not *pari passu*.

I have given to this subject the best attention I have been able, and such is the conclusion to which I have arrived. I regret that the smallness of the amount in question in this case is such as to render the probability of an appeal to the highest tribunal very remote; but I have, on this account, given the subject, if possible, more consideration than I should otherwise have done. The consequence of my decision is, that the promissory note given by *Elizabeth Rowcliffe* did not constitute any charge on her separate estate, and that the claim of Mr. *Bridge* in respect of it cannot be allowed. In other respects the decree is settled.

---

NOTE.—See 12 *Jurist*, part 2, p. 243.

---

### COOPER v. MACDONALD.

May 28.

Under a power to the survivor to appoint new trustees, the Court held, upon the terms of the power, that surviving trustees, appointed by the Court and not under the power, had no authority to exercise it.

THE testator died in 1852, having devised his estate to four trustees, whom he appointed his executors.

The testator's will contained the following power to appoint new trustees :—

He declared that if the trustees thereinbefore named, or either of them, or any trustees or trustee to be appointed under the now stating clause, should die or be unwilling or incompetent to execute the trusts of the said will, it should be lawful for his said wife, in her lifetime, and for the surviving trustees or trustee (if any) after her decease, whether retiring from the office of trustee or not, and if none, for the executors or administrators of the last surviving trustee, to appoint, by

any

any writing under his hands or hand, any fit person or persons to fill the office of the deceased, retiring or incompetent trustee or trustees, but no such appointment should take place after his said wife's decease without the concurrence in writing of the major part of his children who should be then of age and in *England*; and such trustees or trustee so to be appointed should have, execute and exercise the same trusts, powers or authorities as if they or he had been originally appointed, and the surviving acting trustees or trustee for the time being should be fully competent to execute and exercise all the trusts and powers thereby given until another trustee or other trustees was or were appointed, and the majority of the acting trustees for the time being should bind the minority.

1866.  
COOPER  
v.  
MACDONALD.

In 1863, one of the trustees had disclaimed, another had died, and a third was desirous of being discharged, and thereupon the Court appointed two new trustees to act with *John Macdonald*, the last original trustee.

*John Macdonald* died in 1866, and a petition was now presented to appoint a new trustee in his place.

The widow being dead, the surviving trustees claimed, under the terms of the power, the right to appoint the trustee with the consent of the children.

Mr. *Southgate*, Mr. *Selwyn*, Mr. *Baggallay*, Mr. *Beavan*, Mr. *Everett* and Mr. *Speed* for different parties.

*The MASTER of the ROLLS* held that the surviving trustees, having been appointed by the Court and not under the power, had no authority to nominate new trustees, and he directed a reference to appoint new trustees.

1866.



## PATERSON v. PATERSON.

Apr. 21, 23, 24.

*A. B.*, being tenant on the rolls of copyholds held in trust, devised them to *C. D.*, who disclaimed. The Court having made an order, under the Trustee Act, in the absence of the lord of the manor, vesting the copyholds in a new trustee:—*Held*, that the order was regular in form, and that it did not prejudice the right of the lord.

Whether two fines were payable to the lord on the admission of the new trustee *quære*, but *semble* not.

IN 1817 *Peter Paterson* the elder was admitted tenant to some borough English property held of the manor of *Woodford* in *Essex*. He died in 1860, having devised this property to *Peter Paterson* the younger upon certain trusts.

In 1861 *Peter Paterson* the younger was admitted tenant of the property, to hold according to the tenor and effect of the will and according to the custom of the manor.

In 1864 *Peter Paterson* the younger died, having devised his real estate to his widow in fee, and she in 1865 disclaimed the devise of the copyholds.

The parties beneficially interested presented a petition to the Court under the Trustee Act (13 & 14 *Vict.* c. 60), and, in the absence of the lord of the manor of *Woodford*, the Court, on the 3rd of *June*, 1865, ordered as follows:—"That *Abraham Booth* be appointed a trustee of the will of *Peter Paterson* the elder, so far as related to the copyhold and customary hereditaments devised thereby, in substitution for *Peter Paterson* the younger deceased. And it is ordered that all the estate and interest in these copyhold or customary hereditaments devised by the will of *Peter Paterson* the elder, which would have vested in *Sarah Paterson*, if she had accepted the devise of the same hereditaments in the said will of the said *Peter Paterson* the younger contained, do vest in the said *Abraham Booth*, upon the trusts

trusts by the said will and codicil of the said *Peter Paterson* the elder declared concerning the same, or such of them as are now subsisting and capable of taking effect."

1866.  
  
PATERSON  
v.  
PATERSON.

Upon Mr. *Booth's* applying to be admitted tenant to the property, the lord of the manor required to be paid two fines.

Mr. *Booth* declined to pay the two fines, and he obtained from the Court of Queen's Bench a rule against the lord of the manor to shew cause why a *mandamus* should not issue to compel him to admit him. This rule had not yet been argued.

The lord of the manor now presented a petition stating that he was advised that the order of the 3rd *June*, 1865, was informal and irregular and was not in accordance with the Trustee Act, 1850, and that no order could, under that act, be made to vest copyholds in the manner such order purported to do without the consent of the lord of the manor, and that such consent had not been obtained or given, and that such an order must, in all cases, be subject to the usual payments for fines and fees. He also stated that the legal estate in the copyholds was vested in *Peter Paterson* the son by his admission of the 24th *December*, 1861, and that it made no difference, in regard to the lord of the manor and to the fines and fees, whether he was admitted as trustee or in his own right. That he was advised that although the order of the 3rd of *June*, 1865, was informal and irregular, the Court of Queen's Bench could not, on the argument of the rule, entertain the question as to whether it was informal or irregular but would treat it as formal and regular in all respects. That the Petitioner would not be able successfully to resist the issuing of a writ of  
*mandamus*



1866.  
  
 PATERSON  
 v.  
 PATERSON.

*mandamus* directing them to admit Mr. *Booth*, and that they might thereby lose the fines properly payable by Mr. *Booth* on his admission to the copyholds.

The petition prayed that the order of the 3rd of *June*, 1865, might be discharged or reversed, and that, if necessary, the petition upon which it was made might be reheard, and for costs.

Mr. *Selwyn* and Mr. *Valder* for the lord of the manor. Two fines are payable upon the admission of *Booth*. The effect of the disclaimer of the devisee was, to vest the copyhold in the heir; and considering the case, first, independently of the Trustee Act (13 & 14 *Vict.* c. 60), there would be one fine payable on the admission of the heir and one upon his surrender and the admission of *Booth*. The heir, it is true, might surrender to the lord to the use of another without being admitted, but that "cannot prejudice the lord of his fine due to him by the custom of the manor upon the descent;" *Brown's case* (a); *Morse v. Faulkner* (b); *Cruise, Dig.* (c).

But the lord's right is not affected by the Trustee Act (13 & 14 *Vict.* c. 60). By the 34th section the Court may direct that "lands subject to the trust shall vest in the" new trustee, and the order is to have the same effect as if the previous trustee "had duly executed all proper conveyances" of such land. By the interpretation clause (s. 2), the word "land" includes copyholds, and the word "conveyance" includes "surrenders and other acts which a tenant of customary or copyhold lands can himself perform, preparatory to or in aid of a complete assurance of such customary or copyhold lands." The 28th section does

(a) 4 *Rep.* 22 b.  
 (b) 1 *Anstruther*, p. 13.

(c) *Vol.* 1 (4th edit.) p. 292.

does not apply, for the order was not made with the consent of the lord, and it does not appoint a person to convey. Even if it did apply, it imposes no obligation on the lord to admit except subject to "the usual payments." There have been two devolutions of title, and therefore two fines were payable, which cannot be recovered in an action of debt; *Gilbert's Tenures* (a).

1866.  
  
 PATERSON  
 v.  
 PATERSON.

The order ought to be discharged or varied in form, for while it stands, the Court of Law will be bound by it.

They also cited *Scriven on Copyholds* (b); *Lord Londesborough v. Foster* (c); *In re Howard* (d); *In re Flitcroft* (e); *Cooper v. Jones* (f); *Re Howard* (g); *Brown's case* (h); *Gilbert's Tenures* (a); *Lewin on Trusts* (i); 1 *Vict. c. 26, s. 3*.

Mr. Joshua Williams and Mr. C. Browne, *contrâ*. The only question that can be now determined is, the regularity of the order of 3rd of June, 1866. That order is in the usual form and it was properly made *ex parte*, for the lord could not appear or oppose it; *Ayles v. Cox* (k). The question as to fines is not to be determined here but in a Court of Law, and this order cannot affect that question or prejudice the rights of the lord.

The lord cannot insist on payment of the fine as a condition precedent to admission; he is not to be the judge of the amount payable to him but is bound to admit, and he may then enforce payment of the proper  
 fines

(a) *Page* 292.

(b) *Page* 342 (4th edit.)

(c) 3 *Best & Sm.* 805.

(d) 3 *W. Rep.* 605.

(e) 1 *Jur. (N. S.)* 418.

(f) 25 *L. J. (Chanc.)* 240.

(g) 3 *W. Rep.* 605.

(h) 4 *Rep.* 22.

(i) *Page* 179.

(k) 17 *Beav.* 584.

1866.  
  
 PATERSON  
 v.  
 PATERSON

finer either by action or by seizure of the land. Here there cannot be said to be two descents, the land descended originally on the heir on trust and subject to the right of the devisee in trust to be admitted, and the Court, under the 32nd section, has merely substituted another trustee and vested in him the right of the prior trustee to be admitted.

They cited *Watkins on Copyholds* (a); *Reg. v. Willesley* (b); *In re Flitcroft* (c); *In re Hurst* (d); *Glass v. Richardson* (e).

Mr. *Ellis*, Mr. *Speed* and Mr. *Pontifex* for other parties beneficially interested.

Mr. *Selwyn* in reply. The fines were payable on admission and the lord is justified in refusing to admit until he has been paid.

This order prejudices the lord's right in a Court of Law, a Court of Law would assume its regularity and that it was made in the presence or with the consent of the lord. The order represents that there is only one devolution of title, whereas there have been two, and it orders the estate, which would have vested in the widow if she had not disclaimed, shall vest in *Booth*. She was not the trustee in whose place *Booth* was appointed, but the heir was such trustee. He referred to *Reg. v. Wilson* (f); *Townson v. Tickell* (g).

*The*

(a) *Vol. 1, p. 255.*

(b) *2 Ell. & B. 924.*

(c) *1 Jur. (N. S.) 418.*

(d) *Suton on Decrees, 799.*

(e) *2 De G. M. & G. 658.*

(f) *3 Best & Sm. 201.*

(g) *3 Burn. & Ald. 31.*

*The MASTER of the ROLLS.*

I have considered this case and the authorities, and I intend to express an opinion, to some extent only, on this matter.

1866.  
PATERSON  
v.  
PATERSON.  
Apr. 24.

It is an application by the lord of the manor praying that the vesting order made by me on the 3rd of June, 1865, may be discharged. For that purpose the lord comes before me and points out that he is entitled to double fines.

I am of opinion that the form of that order is quite right, and that it is in the form in which I have made many orders, and that it is the ordinary form in which the appointment of new trustees of copyholds is usually made by this Court. I am also of opinion that the *cestuis que trust* were wisely advised that the lord ought not to be served with their petition, and that it was not a proper occasion to discuss the rights of the lord of the manor upon the hearing of the petition for the appointment of a new trustee. I am also of opinion that that order has not prejudiced the lord in the slightest degree, and that if he is entitled to double fines and bring his action to recover them, the form of my order will not affect his rights.

I have also listened carefully to all the arguments of the Petitioners' counsel, but they have failed to prove that there have been two devolutions of title in this case. No doubt if I were to make two devolutions of title in my order it would be very advantageous to the lord of the manor; but I am not entitled to do it, nor am I aware that the lord is entitled to require a fine to be paid on the substitution of one trustee for another, provided there has been no admittance. If there has been

1866.

PATERSON  
v.  
PATERSON.

been an admittance of the first trustee, there can be no question but that the lord would be entitled to a fine on the admission of the second.

If this Court appointed a new trustee who died before admittance and the Court then appointed another trustee, I am not aware that that would be a devolution of title which would entitle the lord to a fine, but where there is a distinct devolution of title he is entitled to it.

I am disposed to think that the view taken by Mr. *Joshua Williams* is the correct one, namely, that the copyhold descends to the heir subject to the right of the devisee to be admitted, and that the Court has substituted another person for such devisee.

I am of opinion that the form of the order is correct, that it was not intended to prejudice, and that it does not prejudice, the rights of the lord if he should bring his action, and I certainly do not intend to prejudice his rights; but I consider this to be the proper form of order and that it would have been wrong to have served the lord with the petition for obtaining it. I have been obliged to hear the points argued in order to consider if the order was right, but the only order I can make on this occasion is, to dismiss this petition with costs.

---

//

1865.

## CLEMENTS v. WELLES.

Dec. 13.

**I**N 1857, the Plaintiff, *Clements*, carried on the business of hairdresser on premises situate in *Leicester Street*, which he held for a term of twenty-one years.

The assignee of an underlease held to have constructive notice of a covenant in restraint of trade contained in an assignment of the original lease, he having precluded himself, by agreement, from examining the prior title.

By an indenture dated the 1st of *June*, 1860, the Plaintiff, *Clements*, assigned the residue of the term to *Welles* in consideration of 250*l*. And *Welles* thereby, for himself, his heirs, executors, administrators and assigns, did covenant, promise and agree, to and with the Plaintiff, his executors, administrators and assigns, that he, *Welles*, his executors, administrators or assigns, or under-tenants, should not nor would, during the said term, carry on, on the said premises thereby assigned, the trade or business of a hairdresser.

The Plaintiff afterwards carried on his business in *Tichbourne Street*, which was not far distant from *Leicester Street*, and the object of the covenant was, to prevent any one setting up in business as a hairdresser on the premises in *Leicester Street*, where that business had, for a considerable time, been carried on by the Plaintiff, and thereby availing himself of the Plaintiff's connexion in business.

By an indenture, dated the 6th of *June*, 1860, *Welles* granted an underlease of the premises in *Leicester Street* for seventeen years to *Filippo Ghio*, who covenanted that he, his executors, administrators and assigns, would not exercise or carry on upon the premises, or permit to be exercised or carried on therein, any art, trade or business whatsoever, except that of a tailor.

1865.  
CLEMENTS  
v.  
WELLES.

By an indenture, dated the 29th of *November*, 1861, *Welles* assigned all his interest in the premises (subject to the underlease to *Ghio*) to Mr. *Hall*.

*Ghio's* underlease became vested in *Devick*, and, in *April*, 1865, the Defendant *Sheat* (a hairdresser) agreed to purchase it from *Devick*; but the agreement for the purchase provided, that the Defendant should not require the production of any title anterior to the indenture of the 6th of *June*, 1860, nor any evidence of the lessor's title to grant the same.

*Sheat's* solicitor required the vendor's solicitor to obtain from the lessor of the lease of the 6th day of *June*, 1860, his consent to his using the premises for the business of a hairdresser and perfumer, and, on the 24th day of *April*, 1865, he received the following permission so to use the premises:—

“Whereas *Edmund Lionel Welles*, the grantor of the lease of No. 19, *Leicester Street, Regent Street*, to *Philipo Ghio*, dated the 6th day of *June*, 1860, (which lease has since been assigned to *Joseph Devick*), has since assigned all his interest in the said premises to me, by a certain deed bearing date the 29th day of *November*, 1861: Now therefore I do hereby consent to *Joseph Devick*, or his undertenants or assigns, carrying on in and upon the said premises the trade or business of a hairdresser and perfumer.

“*W. H. Hall.*”

“24th day of *April*, 1865.”

The underlease was thereupon assigned by *Devick* to *Sheat*, who commenced fitting up the premises for the purpose of carrying on his business of hairdresser and perfumer there.

The Plaintiff filed this bill on the 10th of *May*, 1865, against *Welles* and *Sheat*, praying that *Welles* might specifically perform the covenant in the deed of the 1st of *June*, 1860, against carrying on the trade or business of a hairdresser on the premises in *Leicester Street* and for damages, and for an injunction to restrain *Sheat* from carrying on that trade on the same premises.

1865.  
  
 CLEMENTS  
 v.  
 WELLES.

Mr. *Baggallay* and Mr. *Terrell* for the Plaintiff. The Defendant *Sheat*, having precluded himself from looking into the title to the property, cannot now say that he is a purchaser without notice; *Robson v. Flight* (a); *Parker v. Whyte* (b); and see *Peto v. Hammond* (c); and *Worthington v. Morgan* (d). He has therefore constructive notice of the covenant, and whether it runs with the land or not it is binding on him with this notice; *Tulk v. Moxhay* (e).

Secondly. *Welles*, the original covenantee, has properly been made a party, for his liability is such that he could never get rid of it by assignment.

Mr. *Jessel* and Mr. *C. Hall*, for *Welles*, submitted that having parted with all his interest and being in no default, he had improperly been made a party to this suit.

Mr. *Southgate* and Mr. *J. Simmonds*, for *Sheat*, submitted that he had taken every reasonable and practicable precaution in the matter; that the covenant in question was not binding on him because he had no notice or knowledge or means of notice or knowledge thereof until after he had completed his purchase of the premises;

(a) 34 *Beav.* 110.

(b) 1 *Hem. & Mel.* 167.

(c) 30 *Beav.* 495.

(d) 16 *Sim.* 547.

(e) 11 *Beav.* 571, and 2 *Phil.* 774.



1865.  
~  
CLEMENTS  
v.  
WELLES.

premises; that the covenant could not be binding on him even if he had had notice of it, as it only purported to restrain *Welles*, his executors, administrators or assigns, or undertenants, and that *Sheat* occupied the premises as undertenant of *Hall*, and in no other character; that the covenant was purely personal and could not run with the land, either at law in the strict sense of the term or in equity with notice, and that *Welles*, and his executors or administrators, could alone be made liable for any breach of such covenant. They also submitted that the covenant was void, as an unreasonable restraint of trade, and also because it was founded on no sufficient consideration. They cited *Smith's Leading Cases* (a), and *Flight v. Barton* (b).

*The MASTER of the ROLLS.*

I am of opinion that, as against the Defendant *Sheat*, the Plaintiff is entitled to an injunction. If it were not so and I were to accede to the argument on his behalf, observe what the consequences would be. If a builder, having erected a house, granted a lease of it to another person, and in order that his adjoining house might not be injured, he introduced into the lease a covenant that the lessee would not carry on noxious trades in it, such as that of a soap boiler, the lessee might grant an underlease of the property to another person discharged from the covenant, who might carry on any species of trade on the premises, provided that other person did not look into the title of his lessor, so that the whole covenant would become useless. I am of opinion that this is not so, and that the fact of a person granting an underlease does not put the underlessee in any different position

(a) Page 74.

(b) 3 *Myl. & K.* 282.

position from that of the person granting it, and who has distinct and positive notice of and is bound by all the covenants contained in the original lease.

1865.  
CLEMENTS  
v.  
WELLES.

In this case, though it is hard on *Sheat*, because he knew nothing of the matter and acted perfectly *bonâ fide*, yet when he found that no trade except that of tailor could be carried on upon the premises, he applied for a licence which was given, and I am of opinion that he thereby had constructive notice of the covenant prohibiting other trades. He applied to Mr. *Hall*, knowing that he was the person to apply to for the licence, and the licence refers to the assignment of 29th of *November*, 1861, which was the assignment from *Welles* to *Hall* of the interest in the property which had been assigned to *Welles* by the Plaintiff, and which assignment contains the covenant in question.

Mr. *Sheat* therefore had constructive notice of this covenant, and he cannot now say he is at liberty to carry on the trade of hairdresser on the premises. I must therefore make a decree for a perpetual injunction against him.

But I must dismiss the bill as against *Welles*, who is not in default. He has done no act which could mislead any one; he has granted an underlease with a covenant on the part of the lessee that no trade shall be carried on upon the premises except that of a tailor. He has since assigned all his interest to another person, who, when applied to for a licence, ought to have refused it. *Welles* has not broken the covenant and he does not intend to do so, and there is no case made for bringing him here. I must dismiss the bill against him with costs.

---

1865.

## IN re LONDON, HAMBURG, &amp;c., BANK.

## EMMERSON'S CASE.

## TOOMBS' CASE.

May 2, 24.

The first appearance of the advertisement to wind up a company determines the position of all the shareholders, but up to that time it is open to them to deal exactly as if the company were not about to be wound up, provided the transaction be *bona fide*.

A. sold shares in a company to B., both being ignorant at the time that a petition had been presented to wind up the company, and upon which an order was subsequently made:— *Held*, that notwithstanding the 84th and 114th

**E**MMERSON'S case was as follows:—

On the 6th of *April*, 1865, Mr. *Ward* sold twenty shares in this company to Mr. *Emmerson* for 90*l.*, and the bought note was dated the 11th of *April*. The vendor executed the transfer, and the purchaser paid the consideration money, but the transfer had never been registered, in consequence of an order having been made to wind up the company. It was admitted that the sale was perfectly *bona fide*, both parties being ignorant, at the time of the sale, that a petition had been presented to wind up the company.

The facts however turned out to be, that prior to the contract, and on the 25th of *March*, 1865, a petition had been presented to wind up the company, that the petition had been first advertized in the *Times* and *Gazette* on the 11th of *April*, and that an order to wind up the company had been made on the 22nd of *April*. The consequence of this was, that the transfer of the shares could not be registered, and that the name of Mr.

*Ward*

sections of "The Companies Act, 1862," there was a valid and binding sale.

Under the above circumstances the Master of the Rolls held that he had authority under that act to deal with the case, and he placed the purchaser on the list in lieu of the vendor, whose name had remained on the register. The Lords Justices concurred in thinking that the Court had such authority, but *held* that the circumstances were such that the Court could not specifically perform the contract.

Practice as to appointing Provisional Liquidators.

*Ward* still appeared on the register as holder of these twenty shares. He now applied, by summons, to have his name removed and that of Mr. *Emmerson* substituted.

---

1866.

~~~~~  
In re
 LONDON,
 HAMBURG,
 & C. BANK
 LIMITED.


EMMERSON'S
 CASE.
 TOOMBS' CASE.

Another similar case (*Toomb's case*) came before the Court and was argued at the same time as *Emmerson's* case. The facts relating to *Toombs'* case were as follows:—

On the 27th *March*, 1865, Colonel *Toombs*, by his broker, sold twenty shares to Mr. *Emmerson* for 170*l*. On the 11th of *April*, 1865, the transfer was duly executed by Colonel *Toombs* and sent to Mr. *Emmerson*, and in this case the money was duly paid by Mr. *Emmerson*. The sale was *bonâ fide*, but the transfer of the shares was not registered, solely by reason of the winding-up of the company.

The question really was, whether the sales on the 6th of *April* and the 27th of *March* respectively, being subsequent to the presentation of the petition to wind up, were not void under the 84th and 153rd sections of "The Companies Act, 1862."

Mr. *Everitt* for Colonel *Toombs*. The purchaser is, in equity, the real owner of these shares, and he therefore is the contributory in respect of them. This was a *bonâ fide* sale to a solvent person, and by the 153rd section it is not void if "the Court otherwise orders." The Court ought, therefore, to exercise its discretion and make such an order. There is a marked difference between this section and the 163rd and 164th, which enact that certain dealings "shall be void to all intents," thus leaving no discretion to the Court. The legislature could never have intended that a secret petition,

1866.

In re
 LONDON,
 HAMBURG,
 & C. BANK
 LIMITED.
 EMMERSON'S
 CASE.
 TOOMES' CASE.

tion, if followed by an order to wind up, should invalidate all the *boná fide* transactions, between individuals and not affecting the company, subsequent to the presentation of such petition. In this case there had been a previous petition in *December* for winding up the company, presented by an adverse party but which he abandoned. This shews the difficulty of holding that the validity of all dealings like the present are to depend on the will of the Petitioner, and on the chance of his prosecuting or abandoning his petition.

Mr. *E. R. Turner* for Mr. *Ward*. A valid *boná fide* contract was entered into in ignorance of the existence of any petition to wind up the company. That contract might have been specifically enforced, and the shares and every subsequent dividend belonged, in equity, to the purchaser, and they might have been recovered by him. The party who is entitled to the benefit of the shares is bound to bear the responsibilities. The Court has jurisdiction to determine who is properly the contributory, and in settling the list, it must necessarily determine that question.

He referred to *Beckitt v. Bilbrough* (a); *Shaw v. Fisher* (b); *Cheale v. Kenward* (c); *Walker v. Bartlett* (d); *Costello's Case* (e).

Mr. *Baggallay* and Mr. *E. K. Karlake* for Mr. *Emmerson*. This transaction was incomplete and could only be made perfect by the execution of a transfer and its due registration. It is altogether void under the 153rd section, for it is a "transfer of shares," made "between the commencement of the winding-up" [the presentation

(a) 8 *Hare*, 188.

(b) 5 *De G., M. & G.* 596.

(c) 3 *De G. & J.* 27.

(d) 18 *C. B. Rep.* 845.

(e) 2 *De G., F. & J.* 302.

presentation of the petition] and "the order for winding-up." The Court is bound by the register ; *Birck's Case* (a) ; *Whittet's Case* (b) ; *Lindley on Partnership* (c) ; *Hoare's Case* (d) ; *Bugg's Case* (e) ; and by the 16th clause of the articles of association equities are not to be regarded.

1866.

~~~~~  
In re  
LONDON,  
HAMBURG,  
& C. BANK  
LIMITED.  
EMMERSON'S  
CASE.

TOOMES' CASE.

Again, this was a contract entered into under a mutual mistake, which avoids all contracts. It is like the sale of something which, unknown to the parties at the time, does not exist at the date of the contract, as of a horse which is dead at the time or timber which is severed ; *Bradshaw v. Bennett* (f). The thing purchased, namely, shares in a going company, did not exist, and the liability in a company under liquidation cannot be substituted for it. Lastly, this is not a proper question to be decided summarily on a summons in Chambers.

Mr. Selwyn and Mr. Roxburgh, for the Official Liquidator, referred to "*The Companies Act, 1862*" (25 & 26 Vict. c. 89, ss. 35, 98 ; *Birmingham v. Sheridan* (g) ; *Bosanquet v. Shortridge* (h) ; *Sanderson's Case* (i).

*The MASTER of the ROLLS* (after stating the facts relating to *Emmerson's case*) proceeded :—

May 24.

It was after the petition had been presented, but before any advertisement had been published to the effect that the petition had been presented, that the contract

(a) 2 De G. &amp; Jones, 10.

(b) *Ib.* 577.(c) *Appendix*, 167.

(d) 2 J. &amp; H. 229.

(e) 2 Drew. &amp; Sm. 452.

(f) 5 Car. &amp; Payne, 48.

(g) 33 Beav. 660.

(h) 16 Beav. 84 and 5 H. of L. Cas. 207.

(i) 3 De G. &amp; Sm. 66.

1869.  
 In re  
 Lumsden,  
 Respondent.  
 Dr. Bask  
 Lumsden.  
 Lumsden v.  
 Case.  
 Lumsden Case.

contract between *Ward* and *Lumsden* was entered into. I have further held, and further consideration of the subject confirms me in my opinion of the correctness of the decision, that the first appearance of the advertisement determines the position of all the parties, and that it must be treated as a notice to all the world, not that it necessarily informs the persons who are dealing with the shares of what has occurred, but because I am of opinion that every person who sells such shares ought to satisfy himself previously, if any such petition has been presented. He is, in my opinion, bound to make the inquiry before he offers them for sale. It may, no doubt, be justly said, that this applies to both sides, but it applies in greater force to the vendor, because it behoves him not to sell, as valuable, that which is worth nothing, and no one can ascertain the veracity of his oath, if he should swear that he had not seen or heard of the advertisement which states the failure of the company. These observations, however, only apply to the present case to this extent:—that holding, as I do, that the day on which the advertisement appears binds all parties as they then stood, I am also of opinion that, up to that time, it is open to the parties to deal exactly as if the company was not about to be wound up, assuming, of course, the transaction to be *bonâ fide* in the strictest sense of the term, and that the vendor has no sort of information relative to the instability of the company which he conceals from the purchaser, for if he does, the fraud vitiates the contract. In addition to which, I regard also the public and the other shareholders, and no transfer of shares with a view to escape from the consequences of having become a shareholder, whether pecuniary or moral, when the transferor knows of the condition of the company, will be valid.

It is important on this subject to read the sections of  
 the

the statute (15 & 16 *Vict.* c. 89) which relate to this subject.

The 84th section is in these words :—" A winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up."

1866.

*In re*  
LONDON,  
HAMBURG,  
& C. BANK  
LIMITED.

EMMERSON'S  
CASE.

TOOMBS' CASE.

By the 114th section, any petition for winding up a company "shall constitute a *lis pendens*" within the 2 & 3 *Vict.* c. 11, "provided the same is duly registered in manner required by such act concerning suits in equity."

The 153rd section enacts, that "where any company is being wound up by the Court or subject to the supervision of the Court, all dispositions of the property, effects and things in action of the company, and every transfer of shares, or alteration in the *status* of the members of the company, made between the commencement of the winding up and the order for winding up, *shall, unless the Court shall otherwise order, be void.*"

By this 153rd section a discretion is given to the Court, and I think that the proper mode of exercising it is that which I have already stated. If I adopted the extreme argument, founded on this section, that all transactions from the date of the filing of the petition to wind up are void, this consequence might happen :— a petition to wind up a company might be presented and filed and not advertized for many months ; no one might be aware of it except the Petitioner, and then, after the lapse of many months or even of a year, it might be advertized and an order to wind up made, and thereupon the *bonâ fide* transactions during the twelve months would be rendered invalid. This could not be  
the



1864. he receiving of the certificate. I give a direction to the Court to order that some fine instructions may be made which may come short.

1865. I am therefore of opinion that in this case, the sale from Ward to Emerson was a valid and binding sale, and that from its making there is to be considered the rights and obligations attaching to a shareholder in the company for the twenty shares sold. They come to attach to Mr. Ward and become attached to Mr. Emerson. He would be entitled to all dividends and profits if any declared and made since that time, and is a real liable to the consequences which belong to shareholders existing at that time.

It follows from what I have stated, that, in my opinion, Mr. Emerson must be put upon the list of contributories in respect of the twenty shares bought by him from Mr. Ward in April, 1865.

### TOOMBS' CASE.

#### *The MASTER of the ROLL.*

The same observations apply to this as they did to Emerson's case. Colonel Toombs might have enforced specific performance of the contract in this case, as Mr. Ward could in the last.

I abstain from repeating my views, and hold that Mr. Emerson must be put on the list of contributories in respect of the twenty shares brought by him from Colonel Toombs on the 27th of March, 1865.

I am of opinion that the costs of all parties must be paid  
out

out of the funds of the company, the matter could not have been settled without a reference to and the decision of the Court.

I think it right to add, that since the hearing of this matter an application has been made to me by a solvent company, having shares in another company which was being wound up, to transfer such shares from the name of the first company, in the list of the shareholders, into that of *A. B.*, the first company undertaking that *A. B.* should pay all the calls. The object was very obvious, it was to conceal the fact that the first company had taken shares in the other company, and I refused to interfere. Truth is the foundation of all equity, and I beg it to be known, that if any person comes before me to assist them in misleading others, they must not apply to me for this purpose, for I shall refuse to make an order. The transfer in the case which I have referred to was made prior to the petition to wind up, but when it was known that the failure of the second company was impending. The registration of the transfer was not complete when a Provisional Liquidator was appointed.

My practice as to appointing an Official Liquidator is this:—where there is no opposition to the winding up I appoint a Provisional Liquidator; but when there is any opposition, I never do so, because I might thereby paralyse all the proceedings of the company, and possibly no order to wind up might afterwards be made. After the appointment of a Liquidator no transfer can take place without the sanction of the Court.

---

**NOTE.**—Upon appeal, the Lords Justices Sir *J. L. Knight Bruce* and Sir *G. J. Turner* thought, with the Master of the Rolls, that under the 153rd section the Court had authority to deal with the case; but they thought that, under the circumstances, the Court would not have decreed a specific performance of the contract. The order was consequently discharged. 36 *L. J. (Ch.)* 177.

1866.

*In re*  
LONDON,  
HAMBURG,  
&C. BANK,  
LIMITED.

EMMERSON'S  
CASE.  
TOOMBS' CASE.

1866.

*In re MOSS.*

June 2, 4.

*A. B.* was a partner in a mercantile firm, and was also a partner in a firm of solicitors. The mercantile firm alone were made bankrupt. *Held*, that their assignees were not entitled to the delivery to them, by the firm of solicitors, of the papers of the mercantile firm, until their lien on them had been satisfied.

A solicitor was also a partner in a mercantile firm, which became bankrupt. *Held*, that the bankruptcy of the mercantile firm operated as a discharge of the solicitors' clients, so as to entitle them to the delivery of their papers, upon terms, before the satisfaction of the lien.

**M**R. *MOSS* carried on the business of shipbuilder in partnership with *Alexander Samuelson* and *Martin Samuelson*.

In 1863, *Alexander Samuelson* retired, and the ship building business was thenceforward continued by the surviving partners; but in 1865, this firm (*Samuelson & Moss*) became bankrupt.

Mr. *Moss* had also, during the same period, carried on the business of solicitor in partnership with Mr. *Lowe*, and this firm (*Moss & Lowe*) had been employed as the solicitors of the firm of *Samuelson & Moss* in certain suits and matters, and there remained, at the bankruptcy, in their possession and that of their *London* agents papers and documents belonging to *Samuelson & Lowe* and to *Alexander Samuelson*. On these they claimed a lien for costs, and refused to deliver them up.

After the bankruptcy, the assignees of *Samuelson & Lowe* did not continue to employ *Moss & Lowe*, who still carried on business as their solicitors, and the assignees and *Alexander Samuelson*, requiring the papers for the purpose of the pending proceedings, now applied together for an order on *Moss & Lowe* and their *London* agents for the delivery up of all books and papers in their possession belonging to the applicants without prejudice to the solicitors' lien, or upon such terms as the Court should direct.

Mr. *Selwyn* and Mr. *Bagshawe* in support of the application.

plication. When a solicitor discharges himself, he must deliver over the papers of matters in progress to his successor, notwithstanding his lien upon them; *Rawlinson v. Moss* (a); *Heslop v. Metcalfe* (b).

1866.

~~~~~  
In re
Moss.

In like manner, the client is entitled to the delivery of the papers in a cause where an alteration takes place in a firm of solicitors, as where one retires; *Griffiths v. Griffiths* (c); for the retainer is given to the partnership firm, and ceases when that firm no longer exists, or is substantially changed in its composition. So where a solicitor refuses to proceed; *Wilson v. Emmett* (d); or is imprisoned for debt and rendered incapable, by statute, to act as a solicitor, the papers must be handed over; *Scott v. Fleming* (e). Here, the bankruptcy of *Moss* made an entire change in the circumstances of the solicitors, and it dissolved his partnership with *Lowe*; *Lindley on Partnership* (f). The fact of their having afterwards continued to carry on the business does not alter the effect of the bankruptcy in regard to clients; and the circumstance that one of the clients was one of the firm of solicitors can make no difference.

Mr. *Jessel* and Mr. *Macnaghten* for Messrs. *Moss & Lowe*.

Mr. *Miller* for the *London* agents.

The MASTER of the ROLLS.

In the first place, I think it a matter of great importance that the lien of solicitors should be preserved, it is the only way in which a solicitor can safely engage in business,

(a) 7 *Jurist* (N. S.) 1053.

(b) 3 *Myl. & Cr.* 183.

(c) 2 *Hare*, 587.

(d) 19 *Beav.* 233.

(e) 9 *Jurist* (O. S.) 1085.

(f) *Page* 187.

1844
 1845
 1846
 1847
 1848
 1849
 1850
 1851
 1852
 1853
 1854
 1855
 1856
 1857
 1858
 1859
 1860
 1861
 1862
 1863
 1864
 1865
 1866
 1867
 1868
 1869
 1870
 1871
 1872
 1873
 1874
 1875
 1876
 1877
 1878
 1879
 1880
 1881
 1882
 1883
 1884
 1885
 1886
 1887
 1888
 1889
 1890
 1891
 1892
 1893
 1894
 1895
 1896
 1897
 1898
 1899
 1900

business, and it would frequently happen that, but for such a lien, solicitors would decline to act and the clients would be deprived of the means of obtaining justice. I therefore consider it a matter of great importance for the clients themselves, for the prosecution of their rights in courts of justice, that the right of lien of their solicitors should be preserved.

There are two distinct cases arising here; one relating to the ship building firm consisting of *Martin Samuelson* and *Moss*, and the other to the rights of *Alexander Samuelson* alone. The firm of solicitors acted for both, and the question appears to be a new one.

I find this to be settled by authority:—that if a firm of solicitors becomes bankrupt, the bankruptcy operates as a discharge by them of their clients. But if the client becomes bankrupt and the assignees do not continue to employ the firm of solicitors, that, on the contrary, is a discharge of the firm of solicitors by their client.

Here a mercantile firm employs a firm consisting of two solicitors: the mercantile firm became bankrupt and their assignees refused to employ the same solicitors. That of itself is a discharge of the solicitors. But this further circumstance occurs:—one of the members of the mercantile firm is also one of the firm of solicitors. The firm of solicitors is perfectly solvent and continues to carry on business as before, but it is the firm who employed them that has become bankrupt. I am not disposed to carry the rule further than it has already been carried and I think that, this being a case in which the clients have become bankrupt, I cannot apply to it the principles of those cases in which a solicitor has discharged himself, and that I cannot make the order for delivering up of papers belonging to the firm of bankrupts.

The

The case of *Alexander Samuelson* is different, one of his solicitors has become bankrupt, and I do not see why the altered firm of solicitors should not deliver up the papers to *Alexander Samuelson*; but he must enter into his personal undertaking to pay the costs and the bill of costs must be delivered.

1866.

In re Moss.

The assignees must pay the costs.

REDMAYNE v. FOSTER.

May 29, 30, 31.
June 5.

IN 1831, a partnership for sixty-four years was formed to work a colliery; this was remodified in 1838 by a deed, and the term extended to sixty-three years. The concern was divided into sixty-four shares, of which Mr. *Rawsthorne* was entitled to nine.

As to the rights and remedies of a mortgagee of a share in a colliery partnership.

The partnership deed contained a clause giving a right of pre-emption between the partners of the shares, in the event of a sale of any of them.

The mortgagee of a share in a colliery partnership is entitled to a decree for foreclosure, but he is not entitled to any account of the property paid or distributed to shareholders or partners before he filed his bill, nor is he entitled to contest or call the shareholders to account for their previous management of the colliery, but he is entitled to say, that no extra bur-

In 1845, *Rawsthorne* mortgaged five of his shares to *Redmayne* (since deceased), represented in this suit by the Plaintiff.

As to the subsequent complicated dealings, sufficient will be found stated in the judgment of the Court.

The administratrix of *Redmayne* instituted this suit in November, 1860, to realise the mortgage.

Sir

den shall be thrown on his shares which is not in accordance with some contract or agreement in force at the date of the mortgage.

1866.

 REDWAYNE
 &
 FORSTER.

Sir *R. Palmer* (Attorney-General), Mr. *Cole* and Mr. *Wickens*, for the Plaintiff, asked for a foreclosure decree with special declarations.

Sir *Hugh Cairns*, Mr. *Baggallay* and Mr. *Bedwell*, for the four present partners, contested the Plaintiff's right to a foreclosure of a share in a partnership which would force the mortgagee into the concern, as a partner, without the consent of the other partners. They opposed the special declarations, and argued that the Plaintiff had only a right to a sale, giving the Defendants the right of pre-emption. *Pole v. Leask* (a) was referred to.

Mr. *Selwyn* and Mr. *C. T. Simpson*, for the representatives of two deceased partners, argued that they had improperly been made parties. They cited *Clegg v. Fishwick* (b); *Brown v. De Tastet* (c); *Tuckley v. Thompson* (d).

Sir *R. Palmer*, in reply, adverted to the distinction between a mining concern and a mercantile partnership, and referred to *Parker v. Housefield* (e); *Slade v. Rigg* (f); *Bentley v. Bates* (g).

The MASTER of the ROLLS.

June 5. I think it unnecessary to go through the facts of this case for the purpose of explaining the decree I shall make. Shortly they are these:—a company was formed, or rather an old company was remodified, in *January*, 1838,

(a) 28 *Beav.* 562.

(b) 1 *Mac. & Gor.* 294.

(c) *Jacob*, pp. 284, 289 and 295.

(d) 1 *John. & H.* 126.

(e) 2 *Myl. & K.* 422.

(f) 3 *Hare*, 35.

(g) 4 *Y. & Coll.* (*Erch.*) 183.

1838, to work some collieries. It was divided into sixty-four shares, of which Colonel *Braddyll* held thirty-two, Mr. *Rawsthorne* nine, Mr. *Forster* seven, Mr. *Green* five, Mr. *Powell* five and Mr. *Walker* six.

1866.

 REDMAYNE
 v.
 FORSTER.

In *March*, 1845, *Rawsthorne* mortgaged five of his shares to Mr. *Redmayne*, the testator of the Plaintiff, and the remaining four to Mr. *Green*.

In 1847, *Percival Forster* was the manager of the mine, and by deed of 16th *September*, 1847, *Rawsthorne* assigned his nine shares to *Percival Forster* on certain trusts therein stated, subject, as to five, to the mortgage to *Redmayne*, and, as to the four, to the mortgage to *Green*.

Percival Forster did not execute the deed, but, by letter dated in *September*, 1848, he accepted the trusteeship and undertook to hold the shares on the trusts therein specified. In *July*, 1850, *Rawsthorne* sold his nine shares, subject to the mortgages thereon as aforesaid, to *Forster*.

In 1846, Colonel *Braddyll* became insolvent, and by various deeds, which I am not going to state in detail, forty-four of the sixty-four shares became vested in *Forster*, seven in *Green*, seven in *Brunell* and six in *Walker*; this was principally accomplished in *May*, 1850.

A very long argument has been addressed to me as to the proper construction to be placed on the four deeds in question, which bear date respectively 9th *September*, 1846, the 13th *August*, 1847, the 18th *February*, 1849, and the 13th *May*, 1850, and the

~~THE~~ ~~SHARES~~ ~~WERE~~ ~~TO~~ ~~BE~~ ~~PAID~~ ~~AND~~ ~~WERE~~ ~~PAID~~ ~~THOUGH~~ ~~AT~~ ~~DIFFERENT~~ ~~DATES~~ ~~IN~~ ~~THE~~ ~~SHARES~~ ~~AND~~ ~~AS~~ ~~NOT~~ ~~ABLE~~ ~~TO~~ ~~CONTRIBUTE~~ ~~TOWARDS~~ ~~THE~~ ~~EXPENSES~~ ~~FOR~~ ~~WORKING~~ ~~THE~~ ~~MAINE~~ ~~PREVIOUSLY~~ ~~IN~~ ~~THE~~ ~~CASE~~ ~~OF~~ ~~SUCH~~ ~~SHARES~~ ~~BUT~~ ~~THE~~ ~~SHARES~~ ~~WERE~~ ~~TO~~ ~~BE~~ ~~PAID~~ ~~IN~~ ~~PROPORTION~~ ~~TO~~ ~~THEIR~~ ~~PROPORTION~~ ~~OF~~ ~~WHAT~~ ~~SHOULD~~ ~~BE~~ ~~REQUIRE~~ ~~FOR~~ ~~THE~~ ~~FUTURE~~ ~~THE~~ ~~PURCHASE-MONEYS~~ ~~RECEIVED~~ ~~FROM~~ ~~THE~~ ~~SHARES~~ ~~WERE~~ ~~TO~~ ~~BE~~ ~~APPLIED~~ ~~IN~~ ~~PAYING~~ ~~THE~~ ~~EXPENSES~~ ~~FROM~~ ~~THE~~ ~~FORMER~~ ~~SHARES~~ ~~OF~~ ~~THESE~~ ~~SHARES~~ ~~IN~~ ~~REDEMPTION~~ ~~OF~~ ~~THE~~ ~~EXPENSES~~ ~~OF~~ ~~THE~~ ~~COLLIERY~~ ~~IF~~ ~~THEY~~ ~~HAD~~ ~~BEEN~~ ~~PAID~~ ~~TO~~ ~~STRANGERS~~ ~~IT~~ ~~WOULD~~ ~~PROBABLY~~ ~~NOT~~ ~~HAVE~~ ~~BEEN~~ ~~A~~ ~~MATTER~~ ~~OF~~ ~~MUCH~~ ~~DIFFICULTY~~ ~~TO~~ ~~DISTINGUISH~~ ~~THE~~ ~~RIGHTS~~ ~~OF~~ ~~THE~~ ~~SHARES~~ ~~AND~~ ~~TO~~ ~~TAKE~~ ~~THE~~ ~~ACCOUNT~~ ~~BETWEEN~~ ~~THEM~~ ~~BUT~~ ~~AS~~ ~~THEY~~ ~~WERE~~ ~~ALL~~ ~~BOUGHT~~ ~~BY~~ ~~FORMER~~ ~~PROPRIETORS~~ ~~THE~~ ~~DEEDS~~ ~~WERE~~ ~~BY~~ ~~FOUR~~ ~~TWO~~ ~~BY~~ ~~GREEN~~ ~~AND~~ ~~TWO~~ ~~BY~~ ~~BRADYLL~~ ~~A~~ ~~CONFUSION~~ ~~HAS~~ ~~ARISEN~~ ~~AS~~ ~~TO~~ ~~WHAT~~ ~~SHARES~~ ~~IN~~ ~~THE~~ ~~MAINE~~ ~~OF~~ ~~THE~~ ~~SAME~~ ~~SHARES~~ ~~ARE~~ ~~PAID~~ ~~AND~~ ~~FOR~~ ~~WHAT~~ ~~CONTRIBUTIONS~~

Nothing has been paid or distributed in the way of dividends: the bill is brought for foreclosure of the five shares mortgaged: and the only question is the form of account, which I shall direct, and the declarations, if any, which I shall make for the purpose of taking such an account.

The history of the colliery is this:—Every year the costs sold exceeded the cost of mining them, and thus, in a sense, it is said, that every year the colliery made profits: but, on the other hand, every year it became necessary to make expensive works for the purpose of maintaining and extending the colliery, the expense of which not only absorbed all the profits but required considerable additional outlay, the money for which was produced by calls on the shareholders in proportion to the shares held by them. The result of this has been, that

that though no profits have been divided for many years, the debts owed by the concern are diminished and the concern itself extended and its value improved.

1866.

REDMAYNE
v.
FORSTER.

I do not think that the law on this subject is open to much argument; but the facts are in dispute, and it would be worse than useless to make a declaration as to taking accounts upon a supposed state of facts which is neither proved nor admitted. The law, which I think is clear, is this:—that the Plaintiff is entitled to payment of what is due to him or to a foreclosure of the shares mortgaged. In taking the account, he is not, in my opinion, entitled to ask for any account of profits paid or distributed to shareholders or partners before he filed his bill, nor is he entitled to contest or call the shareholders to account for their previous management of the colliery. But in ascertaining what the Plaintiff's shares are, which may either become his by foreclosure or may be sold, he is entitled to say that no extra burthen shall be thrown on his shares or on any class of shares to which his belong, which are not so thrown in accordance with some contract or agreement in force at the time when the shares were mortgaged to him. The Plaintiff says this had been done; the Defendants deny it, and I cannot make any declaration on a speculative suggestion of facts.

I cannot make the declarations which the Plaintiff asks for; but what I can do is, to make a decree to the following effect, which will I believe enable me, on further consideration, to do justice to the two parties:—

Take an account of what is due to the Plaintiff for principal, interest and costs. Then make a foreclosure decree against Mr. *Forster*, and if the amount be not paid by him, giving the other shareholders an opportunity

1866.
~
REDMAYNE
v.
FORSTER.

tunity of taking the shares, but only one time of payment, not successive foreclosures. If the Plaintiff be not paid, take an account of what debts and liabilities the colliery is now liable to pay, and ascertain what proportion of such debts and liabilities, as between the Plaintiff and the other partners, is properly attributable to the five shares mortgaged by *Rawsthorne* to *Redmayne*. If the Plaintiff be paid, there will be no question, but if not, then take this account, and, on further consideration, I can deal with it. I will allow any Defendant to buy out the Plaintiff on application for that purpose. The other Defendants are, in my opinion, necessary parties, because, in substance, you are paying off a partner who is asking for partnership accounts; the rule about accounts of a mercantile partnership does not apply to the case of a colliery. The Plaintiff is not entitled to have the colliery sold, but he is entitled to be paid or to have a proper account of all the proceeds of the colliery since the bill was filed, and also to know what debts and liabilities are properly attributable to his shares.

1866.

POWELL v. BOGGIS.

Apr. 19, 20.

May 1.

THE testator, by his will dated in 1840, gave and bequeathed to his sister *Charlotte Cutfield* all his freehold and leasehold lands and tenements not therein after otherwise disposed of, and his shares in the *River Arun Navigation* for her life, subject to certain legacies. And he directed them to be sold after her decease by his executor, and he proceeded as follows:—

“And the money arising therefrom, viz. from such sale, I will and direct should be divided by my executors into eight equal parts or shares and paid to my nephews and nieces, children of my sister *Frances Wardroper*, their *heirs* or assigns, viz. two shares or two-eighth equal parts or shares unto my nephew *Richard Wardroper*, one share to my nephew *William Wardroper*, except 600*l.*, which I will and direct should be deducted from his share, he having had that sum, which sum of 600*l.* I will and direct should be divided equally between his brothers and sisters or their *heirs* respectively.”

And as to the other five shares, he directed payment of them to be made to *Charlotte Wardroper* and to others, and he proceeded in these words:—

“Except my niece *Charlotte Wardroper's* eighth part or share, which I will and direct may be put out in government or real security, and the interest or dividends arising therefrom I will and direct shall be paid, by my executor or executors acting on behalf of this my will, unto my niece *Charlotte Wardroper* half-yearly for and during the term of her natural life, and after her decease,

A share of the produce of real and personal estate directed to be sold was given to a *feme sole* for her life, “and after her decease to her *heirs*, as she shall give it by will, and if she die without leaving a will, to her *right heirs* for ever.” Held, that “right heirs” was to be construed “executors and administrators.”

The word “heirs” was used seven times in a will. It was held to mean “executors and administrators” in three places, “next of kin” in two places, “heir-at-law” in one place, and trustees or executors and administrators in the last.

to

1865. I am not to be bound over a by will, and if she die
without issue I will do her "good best for ever."

He then gave the testimony that Elizabeth lands at
Chesham in the parish of Chesham for her life,
subject to certain expenses, and after her death, he gave
the same to his nephew Charles Carpenter and his
issue for ever.

The will then contained the following clause:—

"And I do hereby will and direct, that if any of the
executors or persons hereinafter named that I have
set executor to and will not dispose of the legacies left
to them in this my will, before the time of payment that
they should receive the same, then and in that case, I
do constitute and discharge my heirs and executors from
the payment of such legacies, as they or either of them
the said legacies shall have paid and disposed of before
the time they should have received the same."

He gave all his other property to his sister; and after
stating that he and Maurice Smelt had been trustees of
his mother's will, he directed that his nephews and
nieces should have no claim as their legacies, until they
had given a release to the said Maurice Smelt to in-
demnify him, his heirs and assigns from all claims and
demands under his mother's will.

The testator died in 1842.

Charles Carpenter the tenant for life died in 1863.

Two questions arose; the first under the clause of
forfeiture, in consequence of several of the nephews
having sold and mortgaged their shares before the death
of the tenant for life.

The

The second question arose upon the share of *Charlotte Wardroper*, who married and died without having by will disposed of her share, and leaving her husband surviving her.

1866.

POWELL
v.
BOGGIS.

Mr. *Selwyn* and Mr. *Osler* for the Plaintiff, the trustee.

Mr. *Baggallay* and Mr. *Peck* for the surviving husband and administrator of *Charlotte Wardroper*. In the gift to *Charlotte Wardroper* "heirs" may mean "children;" *Roper on Legacies* (a); *Loveday v. Hopkins* (b); *Bull v. Comberbach* (c). If so, then, as there are no children, the prior absolute gift to her is not cut down, and her representative is entitled; *Whittell v. Dudin* (d); *Mayer v. Townsend* (e); *Campbell v. Brownrigg* (f); *Stummvoll v. Hales* (g).

But it may be a word of limitation, and equivalent to "executors and administrators," in which case she took an absolute interest, which passed to her husband.

Mr. *Gardener*. The gift of these shares is residuary, and the clause of forfeiture has taken effect as to three of them; *Joel v. Mills* (h); *Rochford v. Hackman* (i); *Churchill v. Marks* (k); *Kiallmark v. Kiallmark* (l). In cases of forfeiture, a gift over is unnecessary in the case of a life estate. Being shares of a residue, they are undisposed of; *Wainman v. Field* (m); and pass to the next of kin.

Mr. *Roxburgh* also contended for a forfeiture.

Mr.

(a) *Vol.* 1, p. 90 (3rd edit.)

(b) *Amb.* 273.

(c) 25 *Beav.* 540.

(d) 2 *Jac. & W.* 279.

(e) 3 *Beav.* 443.

(f) 1 *Phill.* 301.

(g) 34 *Beav.* 124.


(h) 3 *Kay & J.* 458.

(i) 9 *Hare*, 475.

(k) 1 *Coll.* 441.

(l) 26 *L. J. (Chanc.)* 1.

(m) 1 *Kay*, 507.

1866.

 POWELL
 v.
 BOGGIS.

Mr. *Joshua Williams* and Mr. *Renshawe* for the co-heirs of *Charlotte*. This is a residuary gift, and three shares have become forfeited and are undisposed of. The heir is therefore entitled; *Brooke v. Brooke* (a); *Townsend v. Early* (b); *In re Payne* (c); *In re Catt's Trusts* (d); *Dommett v. Bedford* (e); *In re Dickson's Trusts* (f). A mortgage is a sale *pro tanto*, and creates a forfeiture; *Bennett v. Wyndham* (g). Secondly, the heir takes as purchaser; *Mounsey v. Blamire* (h); *De Beauvoir v. De Beauvoir* (i); *Haslewood v. Green* (k); *Woolcomb v. Woolcomb* (l).

The MASTER of the ROLLS, before calling on the other side, said,—

I am of opinion there is no forfeiture. It is important to distinguish between these classes of cases. A person may give a limited interest in real or personal estate; he may limit *Whiteacre*, or a sum of 1,000*l.* to A. for life, and direct that, on the happening of a particular event, it shall go over to another person; as, for instance, upon A.'s becoming bankrupt or insolvent, or on any other event. He may direct that the interest shall determine on the happening of a certain event, and that without giving the estate or the money over to another person.

A testator may also give a sum of money or an estate either absolutely or for a limited interest, and require that the donee or person to take that interest shall fulfil a particular condition previously to or upon taking the legacy; as in one case the testator required that his daughter

(a) 2 *Vern.*

(b) 34 *Beav.* 23.

(c) 25 *Beav.* 556.

(d) 2 *Hem. & M.* 46.

(e) 3 *Vesey*, 149.

(f) 1 *Sim.* (N. S.) 37.

(g) 23 *Beav.* 521.

(h) 4 *Russ.* 384.

(i) 3 *H. of L. Cas.* 554.

(k) 28 *Beav.* 1.

(l) 3 *Peere Wms.* 112.

daughter should not be a nun, and the Court required that condition to be fulfilled. If this had been one of this latter class of cases, I should be of opinion that it would not be a case of forfeiture, but a case in which the legatee was not entitled.

1866.

POWELL
v.
BOGGIS.

But in this latter class of cases the nature of the condition imposed must be considered. The condition must not be repugnant to the gift itself; for instance, a testator cannot leave 1,000*l.* to *A. B.* and say he shall not dispose of it, for such a condition is repugnant to the gift itself, and the law does not allow such a condition to be added to the gift. So also a testator cannot give an estate or legacy to one for life, and say that she shall not dispose of it. But he may do this in another form; he may say the donee shall have it until he does such an act, and direct that the estate, on that act being done, shall pass over to another person. But he cannot couple with a gift a condition that the donee shall not dispose of what is given; for a person cannot have the enjoyment of a thing if he cannot dispose of it. This does not interfere with the power of a testator to limit a property in a particular way; he may give it to *A. B.* for life, with power to dispose of it by deed or will in favor of particular persons, with a gift over to other persons, if he fail so to dispose of it. If a man cannot give 1,000*l.* and say the donee shall not dispose of it as he pleases, so neither can he give it in reversion and say the donee shall not dispose of it as he pleases. He cannot give 1,000*l.* to *A.* for life, and afterwards to *B.*, and say that *B.* shall not afterwards dispose of that property.

The only question here is, whether the manner in which this forfeiture clause is framed amounts to this:—that it is a condition which the legatee is to fulfil in order

1866.

POWELL
v.
BOGGIS.

order to entitle him to the property, or whether it is a clause of forfeiture imposed on the legatee by the testator to prevent him from disposing of the legacy given to him. I am of opinion that it is nothing more than a forfeiture imposed upon him to prevent him disposing of the legacy given to him.

There can be no question but that the legatees took vested interests, and that an absolute interest was given to them. Then the testator directs that if any of the legatees should sell and dispose of the legacies before the time of payment, then "he exonerates and discharges his heirs and executors from the payment of such legacies." There is no condition introduced there; it is merely a statement that, having given to them an absolute interest in the eighth of the produce of certain real estate, they are not to dispose of it, and if they attempt to dispose of it, they shall not have it. I am of opinion that this is repugnant to the nature of the gift, and that the testator had not the power of coupling that condition with his gift. He might just as well say, if they sell it or dispose of it or mortgage it, after they get the property, they will be bound to refund it. It is a limitation and condition which the testator cannot impose, to say that the legatee shall not dispose of the property given to him. I am of opinion that the clause of forfeiture is void.

Mr. *Jessel* and Mr. *Druce* then argued that the next-of-kin took the share of *Charlotte Wardroper*.

They relied on *Gittings v. M'Dermott* (a); *De Beauvoir v. De Beauvoir* (b); *Mounsey v. Blamire* (c); *In re Rootes*.

(a) 2 *Myl. & K.* 69.

(b) 3 *H. of L. Cas.* 524.

(c) 4 *Russ.* 384.

Rootes (a); *Doody v. Higgins* (b); *In re Gamboa's Trusts* (c); *King v. Cleaveland* (d); *Low v. Smith* (e).

1866.

POWELL
v.
BOGGIS.

Mr. C. Hall, Mr. Southgate, Mr. De Ger, Mr. Horton Smith and Mr. Hardy for parties interested in the other shares.

The MASTER of the ROLLS.

There are two questions which arise under this will, one is a question of forfeiture, which I disposed of at the hearing, the other is the meaning of the word "*heirs*" in the following bequest: "and if she die without leaving a will to her *right heirs* for ever." On consideration, I think the word *heirs* means "executors and administrators."

May 1.

It is said that the word "*heirs*," in a will of personalty, never is a word of limitation; that is quite true, and it is quite true that the rule in *Shelley's Case* is a technical rule and applies only to real estate, and the rule that "heir" is never to be so construed is said to be laid down in *Gittings v. M'Dermott* (f). But I think that there is a misapprehension as to this. There is no question as to the rule in *Shelley's Case*, which in no sort of way applies to this case; but, on the other hand, no technical rule applies to the construction of wills, to the effect that the word "heirs" never can be applied by a testator in disposing of personalty, except to designate heir-at-law or next of kin as the person designated to take. On the contrary, in my opinion if a testator chooses to use the word "heirs" as "executors and administrators," he may do so. For instance, if a testator give 1,000*l.* to A. and

(a) 1 *Drew. & Smale*, 228.

(b) 2 *K. & J.* 729.

(c) 4 *Ibid.* 756.

(d) 26 *Beav.* 26, 166.

(e) 25 *Law J. (Chanc.)* 503.

(f) 2 *Myl. & K.* 69.

1866.

POWELL
v.
BOGGIS.

and his heirs, that is not a gift to him and his next of kin or to him for life and afterwards to his next of kin, but *A.* would take it absolutely. A testator may apply the word "heirs" to designate "executors and administrators" if he think fit, and the only question on this will, taking the whole together, is, whether he has done so.

I find the word "heirs" employed in seven places in this will, and in one only does it mean "*heirs*" in the technical sense of the word, that is as *heirs-at-law*. In two places it means "executors or administrators," in two others it may mean "executors or administrators" or "next of kin," and in another place it means "next of kin," and the question is, what it means here.

I proceed to examine the will. In the first place, he gives freehold and leasehold lands and shares in the *River Arun Navigation to Charlotte Cutfield* for her life, and then they are to be sold and divided into eighths, and paid to his nephews and nieces, "their *heirs* or assigns." This is the first occasion on which the word "heirs" occurs, and it is quite clear that he uses the words "heirs or assigns" as equivalent to executors, administrators and assigns. That is, he gives them absolute interests, and that is what the word simply expresses.

He then gives one share to *William Wardroper*, after deducting 600*l.* from it, which 600*l.* he directs "shall be divided equally between his brothers and sisters or their *heirs* respectively." This is the second occasion where he uses the word "heirs," and I am of opinion that it here means next of kin, and that brothers or sisters alive at the testator's death would take absolutely, but if dead, his share would go to his next of kin.

I now

I now come to the bequest in question, which is the one-eighth share of *Charlotte Wardroper*, which he directs to be invested and the interest paid to her for life, and "after her decease, to her *heirs* as she shall give it by will." Now there is considerable difficulty as to the meaning of this word *heirs* here, and I am not at all clear that he did not intend to give her an absolute power of disposition to anybody she pleased. But I assume that it here bears a limited construction, in which case the *personæ designatæ* are the next of kin. He proceeds, "and if she die without leaving a will, to her right heirs for ever." The question is, what the words "right heirs" mean in this case. It is insisted that to construe this executors and administrators would be giving her an absolute interest, and would be inconsistent with the life estate previously given to her. I am of opinion that this is not so, because the testator might have anticipated her marrying, in which case she would have no power to dispose of it by will, unless he gave a power for that purpose. I think this is clear, that, in the gift to *Charlotte Wardroper*, he did not mean the same thing by the words "her heirs" and "her right heirs for ever." The word "heirs" does not appear to me to be used in the same sense in both those places, and I think that in the latter case it means the persons who would take it by law, and that it consequently means "executors and administrators."

1866.

POWELL
v.
BOGGIS.

The testator then gives freeholds and copyholds at *Aldingborne* to his sister for life, and after her death, to his nephew "and his *heirs* for ever." This is the fifth place in which he uses the same word "*heirs*," and here and here only, the word "*heirs*" is used in its legal and proper signification as "heir-at-law."

In the forfeiture clause he provides that the legacies
shall

1866.

POWELL
v.
BOGGIS.

shall be forfeited by a sale before payment, and says "then and in that case I do exonerate and discharge my *heirs* and executors from the payment of such legacies." What the word "*heirs*" means here is not very clear; but this is clear, that it is not "*heirs-at-law*," because they have nothing to do with the payment of legacies, nor does it mean next of kin. It probably means trustees and executors and the persons whose duty it is to discharge the legacies, but it is quite clear that it neither means the "*heir-at-law*" or "*next of kin*."

The only other place in which he speaks of *heirs* is that in which he directs an indemnity to be given by his nephews and nieces to *Maurice Smelt*, "*his heirs* and assigns." The word *heirs*, in the last place, must mean the persons to be indemnified, and is equivalent to "*executors and administrators*."

So that having used the word seven times, in two places it means "*executors or administrators*," and in two others it means "*next of kin*." In one place only it means "*heirs-at-law*." In the sixth it either means or is equivalent to executors or else devisees in trust, and the question is, what does it mean in the seventh.

The case of *Gittings v. M'Dermott* (a) does not touch this, nor does in fact any one of the other cases. The testator has here, and in other places in this will used the word as equivalent to "*executors and administrators*," and I think that so to construe it here makes the whole plain and consistent, and I am of opinion that this is the meaning of the testator, and consequently, as *Charlotte Wardroper* left no will, she took absolutely and her husband, having taken out administration, is entitled to her share.

(a) 2 *Myl. & K.* 69.

1866.

PARTRIDGE v. FOSTER. (No. 2.)

THE testator, by his will, bequeathed his leasehold estate and all his property to trustees, upon trust, out of the rents of the leaseholds, to raise an annuity of 60*l.* for his daughter *Mary Ann Largar*, to continue till the year 1880, unless the same should previously determine, and to be paid to his daughter *Mary Ann* during her life, and after her decease, the annuity to be held on trust for her children to the year 1880. He then proceeded as follows:—

“ But if no such child, at the decease of my said daughter, shall be then living, the trusts hereinbefore declared to cease and determine and be then held upon trust for my son *William Foster*. And I hereby direct, that if my son *Henry J. Foster*, now absent, shall, within five years, make his claim to my trustees, he shall be entitled to and receive one moiety of my said leasehold estate, subject however, together with the other moiety thereof in favor of my son *William*, to the annuity and trusts before mentioned.”

He then gave some legacies and the residue of his estate between his son *William* and his daughter *Mary Ann*.

The testator died in 1841.

The testator's son *Henry* had never been heard of since the testator's death.

The testator's daughter had died leaving children.

May 4, 5.
A testator bequeathed his leasehold estate to trustees, in trust, out of the rents, to pay an annuity to his daughter, and he proceeded:—“ And I hereby direct, that if my son *Henry*, now absent, shall, within five years, make his claim to my trustees, he shall be entitled to and receive one moiety of my said leasehold estate, subject however, together with the other moiety thereof in favor of my son *William*, to the annuity and trusts before mentioned.” *Henry* made no claim:—*Held*, that *William* was entitled to a moiety of the leasehold subject to the annuity, and that the gift to him was not contingent on *Henry's* claiming.

1866.
 PARTRIDGE
 v.
 FOSTER.
 (No. 2.)

This suit was instituted by a judgment creditor of *William Foster* to obtain payment out of a leasehold in which Mr. *Foster* was interested under the testator's will. The case is reported *ante* (a) on a demurrer.

The trustees, before notice of the judgment, had, as they alleged, made payments to *William* exceeding his share of the income, and they claimed to recoup themselves.

The cause now came on for hearing.

Mr. *Southgate* and Mr. *Bevir* for the Plaintiffs, as to the right of the judgment creditor to relief, cited *Partridge v. Foster* (a); *Yescombe v. Landor* (b); *Godfrey v. Tucker* (c); *Smith v. Hurst* (d).

They argued that *William* was now entitled to the entirety of the leaseholds, subject to the existing annuity.

Mr. *Roberts*, for *William Foster*, argued that he took the whole, and as to the relief sought, he commented on *Godfrey v. Tucker* (c), and *Beavan v. Lord Oxford* (e).

Mr. *Selwyn* and Mr. *Chapman Barber*, for the trustees of the will, claimed a right to recoup themselves, out of the future rents, the over payments they had made to *William* prior to their receiving notice of the judgment. They cited *Priddy v. Rose* (f).

Mr. *Swanston*, for *Edward Largan*, the son and representative of the testator's daughter, argued that the gift

(a) 34 *Beav.* 1.
 (b) 28 *Beav.* 80.
 (c) 33 *Beav.* 280.

(d) 1 *Coll.* 705, and 10 *Hare*, 30.
 (e) 6 *De G., M. & G.* 492, 507.
 (f) 3 *Mcr.* 86.

gift to the son *William* was contingent on the son *Henry* making the claim within five years, and that this contingency had not happened. That there was no implied gift to *William*, and that the leaseholds passed under the residuary clause.

1866.

PARTRIDGE
v.
FOSTER.
(No. 2.)

Mr. *Southgate* in reply.

The MASTER of the ROLLS

The question on which I reserved the expression of my opinion yesterday was, what interest in the leaseholds *William Foster* took under this will. I am of opinion, that he took one half, and no more, and that the other half is to be divided equally between himself and his sister.

May 5.

The absolute interest of the leaseholds is given to trustees, on trust to raise an annuity for the daughter for her life, and after her death for her children, but to continue only until the year 1880.

The testator then says, if my son *Henry* "shall within five years make his claim to my trustees, he shall be entitled to receive one moiety of my said leasehold estate, subject (together with the other moiety thereof in favor of my son *William*) to the annuity on the trusts before mentioned." Now leave out the parenthesis and the bequest will then be as follows:—"If my son *Henry* shall, within five years, make his claim to my trustees, he shall be entitled to receive one moiety of my said leasehold estate, subject, however, to the annuity and the trusts before mentioned."

That would be very plain and simple; but then the
 N N 2 parenthesis

1866.
PARTRIDGE
v.
FOSTER.
(No. 2.)

parenthesis says "together with the other moiety thereof in favor of my son *William*." I do not think that this means that the gift to *William* is to depend upon the contingency of the other son *Henry* claiming within five years, but that it means, I give the other moiety to my son *William*, and the testator has not disposed of the first moiety except in the event of his son *Henry* claiming within five years, which he has not done.

I am of opinion, that this moiety falls into the residue, and the result is, that *William Foster* is entitled to three-fourths of the leaseholds, and the representatives of *Mary Ann*, who is dead, are entitled to the remaining one-fourth.

I think the Plaintiff is entitled to have *William's* share sold, unless some other arrangement be come to between the parties. I also think that the trustees are entitled to retain out of his share what they have overpaid him.

1866.

GARDENER v. ENNOR.

HUMBY v. MOODY.

Apr. 27, 28,
30, 31.
May 25.

THE first of these suits (*Gardener v. Ennor*) was instituted by *Gardener* and *Burridge* against *Adolphus Ennor*, *James Humby* and others to foreclose a mortgage; the second suit (*Humby v. Moody*) was instituted by *Humby* and *Adolphus Ennor* to set aside an agreement, and to make the mortgage stand only as a security for the amount to be found actually due on taking certain accounts. The facts were complicated; but, so far as the point of law is concerned, they may be stated shortly as follows:—

Nicholas Ennor (the father of *Adolphus Ennor*) was entitled to a lease of some lead mines in *St. Cuthbert Wells* in *Somersetshire*, and, in respect of matters connected with this mine, he was engaged in two law suits.

In 1859-60, *Nicholas Ennor* sold his interest to *Adolphus Ennor* and *James Humby* for 12,000*l.*, payable by instalments, and the purchasers were also to pay the costs of the two law suits.

In 1861, a company called the *West of England Company* was formed for working the mine. It was divided

obtain from him present relief, and at the same time indulge the expectation that the Court will afterwards, at their instance, annul the whole transaction on the ground of the relation subsisting between them.

Plaintiffs, though successful in their suit, held disentitled to costs by reason of unfounded charges made by them against the Defendant.

Transactions between solicitor and client, by which the former obtained gifts, and an undue advantage, set aside and the securities ordered to stand good only to the extent of what might be found justly due to the solicitor.

Though this Court holds that it is highly improper for a solicitor to derive a personal advantage in the shape of gifts from his clients, or in the shape of the liquidation of his bills untaxed and undelivered, still the Court cannot approve of clients entering into transactions with their solicitor, whereby they

1866.

 GARDENER
 v.
 ENNOR.
 HUMBY
 v.
 MOODY.

divided into 400 shares of 100*l.* each, of which *Adolphus Ennor* and *Humby* took 345.

Thirty shares were allotted to Mr. *Burridge*, a solicitor, who had been engaged in all these transactions for *Nicholas Ennor*, and had also, in the sale of the mine to the Plaintiffs, acted for them. The amount which, at this time, Mr. *Burridge* claimed to be due to him from *Nicholas Ennor* was 3,709*l.* 16*s.* 10*d.* The thirty shares allotted to Mr. *Burridge* were originally intended to be in part payment of this bill of costs, leaving 709*l.* 16*s.* 10*d.* unpaid; but it was ultimately agreed that Mr. *Burridge* was to have them as a gift. The matter was thus stated by him in his answer:—

“And I say, that the Plaintiffs afterwards released me from my agreement to treat the shares as taken in part satisfaction of my costs, and agreed to pay me all my costs in full, in addition to giving me the said shares.”

Afterwards, in *September*, 1861, *Nicholas Ennor* filed a bill in this Court against *Adolphus Ennor* and *Humby* (*Ennor v. Humby*) for the specific performance of the contract of purchase by them, and some of the arrangements, made between the Plaintiffs and Mr. *Burridge*, were entered into in order to satisfy the orders made by the Court in that suit.

The first arrangement between the Plaintiffs *Adolphus Ennor* and *Humby* and Mr. *Burridge* was effected by an agreement dated the 29th *January*, 1862, whereby, in consideration of *Burridge* not calling for the immediate payment of the several bills of costs due from *Nicholas Ennor*, *Adolphus Ennor* and *Humby*, the latter “agreed to pay the several bills of costs as the same were then made out and delivered or about to be delivered by
 Mr.

Mr. *Burridge* to *Nicholas Ennor*" under an order of Court. And in consideration of 2,000*l.*, stated to be procured for them of *Gardener* to pay *Nicholas Ennor*, and likewise in consideration of *Burridge* having procured loans from his bankers of other sums for them, and in consideration of 2,000*l.* procured for them of *Stuckey's Banking Company* amounting to 871*l.* 7*s.* 9*d.*, they agreed to repay him the same sums, respectively, with interest at 5*l.* *per cent.* and for the advances with interest." And for the several considerations aforesaid they also agreed to allot and give to *William Burridge* twenty free and paid up shares in the *West of England Lead Smelting Company (Limited)*, in addition to the five free shares heretofore agreed by them to be allotted and given to him in the company." And they agreed that all deeds and documents in his custody should be pledged to him for the bills of costs and the moneys advanced or to be advanced.

1866.

 GARDENER
 v.
 ENNOR.
 HUMBY
 v.
 MOODY.

The Plaintiffs *Adolphus Ennor* and *Humby* sought to set aside this agreement *in toto*, on the ground that it was a transaction between a solicitor and his clients for the benefit of the solicitor himself.

After this, and in *April*, 1862, Mr. *Elford* brought two actions against *Adolphus Ennor* and *Humby* to recover money advanced, and on this occasion Mr. *Burridge* acted as their solicitor and adviser.

In this state of things, a second agreement was entered into, on the 27th *May*, 1862. It was in the form of an undertaking, whereby *Adolphus Ennor* and *Humby* undertook to execute to *Burridge* a mortgage of the mines for 4,500*l.* which he had provided, as well as for the former sums advanced by and through him and future advances. "And for the considerations aforesaid *Adolphus Ennor* and

1866.

 GARDENER
 &
 ENNOR.
 HUMBY
 &
 MOODY.

and *Humby* agreed to transfer forty-five shares to *Burridge* of 100*l.* each in the said company, in addition to fifty-five shares previously agreed to be given to him, making his, *Burridge's*, interest in the concern, with the thirty shares taken by him on the formation of the company, 10,000*l.*; and if at any time the company should cease to exist, *Burridge's* interest in the concern should continue the same in proportion to the then present share capital in the concern, *videlicet*, one-fourth interest, but subject to the liabilities of the company."

The bill asked that this undertaking, so far as it related to the forty-five shares in the company agreed to be transferred, might be declared void.

On the 1st of *November*, 1862, the Plaintiff mortgaged the mine to secure to *Gardener* 3,500*l.* and to *Burridge* 3,192*l.* 0*s.* 5*d.*

The bill prayed that this mortgage might be ordered to stand as a security for so much as should be found due from the Plaintiffs.

Mr. *Southgate* and Mr. *Cutler*, for *Gardener* and *Burridge*, the Plaintiffs in the first cause, cited *Bozon v. Bolland* (a); *Harris v. Tremenheere* (b); *O'Brien v. Lewis* (c); *In re Boyle* (d).

Mr. *Jessel* and Mr. *Stock*, for *Humby* and *Adolphus Ennor*, the Plaintiffs in the second suit, cited *Thomson v. Judge* (e); *Rhodes v. Bate* (f).

Mr. *Baggallay* and Mr. *Pearson* for *St. Cuthbert Company*.

Mr.

(a) 4 *Myl. & Cr.* 354.

(b) 15 *Ves.* 34.

(c) 9 *Jur.* (N.S.) 321 and 528.

(d) 5 *De G., M. & G.* 540.

(e) 3 *Drew.* 306.

(f) 1 *Law Rep. (Chanc.)*
Appeal, 252.

Mr. Jessel in reply. *Hatch v. Hatch*(a); *Cox v. Wells*(b); *Walmesley v. Booth*(c); *Newman v. Payne*(d); *Montesquien v. Sandyes*(e).

1866.

GARDENER
v.
ENNOR.
HUMBY
v.
MOODY.

The MASTER of the ROLLS.

The first head of relief asked by the Plaintiffs is, to set aside the agreement of the 29th of *January*, 1862, *in toto*, first, on this ground, that it was a transaction between them and their own solicitor solely for the benefit of the solicitor himself; and secondly, that the representation of facts, on the face of the agreement itself, was erroneous. The first objection is not easily disposed of; it was, I think, a transaction between the Plaintiffs and their own solicitor, in which I cannot say that all the benefit was derived by Mr. *Burridge*, but it was one which, in my opinion, was very onesided, and very materially for his advantage. The advantages he obtained were, first, the payment without taxation of his four bills of costs, one of which he had not then even delivered; secondly, the repayment with interest of the sums advanced by him towards carrying on the mine; thirdly, the allotment of twenty-five paid up shares in the company to be formed; fourthly, a lien on all documents in his possession for bills of costs and money advanced or to be advanced by him. These twenty-five shares were to be in addition to the thirty shares allotted him in part payment of the bills of costs.

May 25.

The consideration for which the Plaintiffs entered into this agreement was, that they owed Mr. *Burridge* money, that he had procured loans for them and had advanced

and

(a) 9 *Ves.* 292.
(b) 1 *Cox*, 112.
(c) 2 *Atk.* 25.

(d) 2 *Ves. jun.* 202.
(e) 18 *Ves.* 302.

1866.

GARDENER
v.
ENNOR.
HUMBY
v.
MOODY.

and would advance money to carry on the mines. In fact, however, the loans (which were all advanced by *Stuckey's Banking Company*) were received by Mr. *Burridge*, in part discharge of what was due to himself, as appears from the account set forth by him in his answer. It is also to be observed, that the Plaintiffs were not primarily liable to pay either of these bills of costs to Mr. *Burridge* or the mortgage on the mines to Messrs. *Gardener*; these were, in fact, due by *Nicholas Ennor*, and if the purchase by the Plaintiffs had gone off, they would not have been in any way liable to pay these amounts. At the same time, it is obvious that the Plaintiffs were in great want of money to carry on the mines, and, unless by entering into this agreement, little prospect seems to have existed of their obtaining any, and though such future advances formed no part of the specified consideration for the agreement, still the tacit understanding between the parties to it seems to me to have been, that money should be supplied by Mr. *Burridge* in future, as in fact it was.

That part of the transaction which consists of the gift of the twenty-five shares is also very objectionable. The mines were a valuable property, though probably worth less than the sum at which they were fixed by the nominal amount attributed to the shares in the company, still they were a property of value, and twenty-five shares represented one-sixteenth part of the whole value of the mines.

This agreement is, however, so mixed up with the subsequent transactions that, in my opinion, it is impossible to deal with it as if it were the sole transaction, in which case, probably, I should, upon the Plaintiffs undertaking to pay what was due to Mr. *Burridge* on his bill of costs, such amount to be allowed in part payment

ment of the purchase-money due to *Nicholas Ennor*, order the same to be delivered up to be cancelled.

1866.

GARDENER
v.
ENNOR.
HUMBY
v.
MOODY.

But the transaction does not rest here, for a second agreement was shortly afterwards, on the 27th of *May*, 1862, entered into between the Plaintiffs and Mr. *Burridge*.—[His Lordship stated this agreement and the other transactions.]

This completes the transaction, so far as relates to the forty-five shares in the *West of England Company*, which company, it is proper to observe, was only another name for the Plaintiffs. I am of opinion, notwithstanding that the evidence and correspondence shew that the Plaintiffs knew perfectly well what they were about, yet that a transaction of this character, founded on the agreement of *January*, 1862, which I have already commented upon, cannot be allowed to stand as a valid transaction, so far as it regards any aid or assistance from this Court to enforce it.

Four days after this agreement a mortgage of the mines was, on the 31st *May*, 1862, executed by the Plaintiffs to Messrs. *Moody & Smith* to secure the sum of 2,350*l.*, which was advanced by them to enable the Plaintiffs to comply with the order of the Court made in the case of *Ennor v. Humby*, directing the payment into Court of a sum of money due from the Plaintiffs in respect of the purchase-money.

On the 1st of *November*, 1862, the mortgage was executed by the Plaintiffs to Mr. *Burridge* which forms the subject of the second branch of relief prayed for by the Plaintiffs. This mortgage is to this effect—[His Lordship stated it.]

The

1866.

GARDENER

v.

ENNOR.

HUNBY

v.

MOODY.

The bill prays that this mortgage may be ordered to stand as a security for so much only as, upon taking the account between the Plaintiffs and Mr. *Burridge*, shall be found to be due from them, and the bill alleges a great variety of circumstances to shew the fraudulent character of this deed, and how they were surprised into executing it without a due knowledge of its contents. I regret to say that these allegations in the bill, as well as those of a like nature relating to the two previous agreements, which must have been introduced on the instruction of the Plaintiffs, are destitute of foundation. As regards this ground for impeaching the mortgage deed, the bill wholly fails. It also fails as regards Mr. *Gardener*.

But as regards the 3,192*l.*, said to be advanced by the Defendant *Burridge*, the case appears to me to be very different. The balance is made out by his account, to which I have already referred, set forth in his answer. The items in this account do not appear to have been vouched, and several of them are, in my opinion, such, that the Plaintiffs are entitled to have the accuracy of them tested. If the matter had stood here, unconnected with the *St. Cuthbert Company*, it appears to me that the just and equitable mode of dealing with the transactions between the Plaintiffs and Mr. *Burridge* would be the following:—

Declare the agreement of the 29th *January*, 1862, to be void, and direct it to be delivered up to be cancelled, on the Plaintiffs undertaking that the mortgage of 1st *November*, 1862, shall stand as a security for all sums justly due and owing by them to Mr. *Burridge*, including therein the sums due from *Nicholas Ennor* to *Burridge* in respect of the four bills of costs referred to in the agreement of 29th *July*, 1862, claimed by Mr. *Burridge* against *Nicholas Ennor*, the amount due thereon

thereon respectively to be ascertained by taxation, and the total amounts due thereon to be allowed to the Plaintiffs as part payment of the purchase-money due from them to *Nicholas Ennor* in the suit of *Ennor v. Humby*, for which purpose all necessary applications are to be made in that suit. And for the purposes aforesaid, all necessary accounts would have to be taken, but, in taking such accounts, I should give a direction, that where a sum of money is entered as paid to the Plaintiffs in the account in the answer, by which the balance of 3,192*l.* 0*s.* 5*d.* is arrived at, and for which the mortgage was given by them, that this sum shall be treated as having been admitted by the Plaintiffs to have been paid to them and that it should not require to be vouched.

This, it appears to me, is the only foundation on which the Plaintiffs can ask to settle the accounts and the mortgage security and transaction between them and the Defendant *Burridge*.

[His Lordship adverted to the difficulty arising from *Nicholas Ennor* not being a party to these suits and the transaction in respect of the *St. Cuthbert Company*, who had since purchased the mine, and the modification in the decree which these circumstances require.]

Of course it will appear from this that my declaration as to the invalidity of the agreement of 29th *January*, 1862, makes the gift of the forty-five paid up shares to Mr. *Burridge* absolutely void, and that he has, in my opinion, no interest in the said company, except in respect of such shares as he has taken or intends to take and to pay up the amount of the calls thereon. It is also evident from my declaration, that Mr. *Burridge's* claim of a lien in respect of the agreement of 29th *January*

1866.
GARDENER
v.
ENNOR.
HUMBY
v.
MOODY.

1866.
GARDENER
v.
ENNOR.
HUMBY
v.
MOODY.

January, 1862, is gone by the mortgage, or rather that it is merged, by reason of the conditions I impose on the Plaintiffs with respect to the claim against them by the transaction in question as it existed under the mortgage of 1st November, 1862.

I have also read and considered the evidence as regards the costs to be given on these transactions, and I am of opinion that, as between the Plaintiffs and Mr. *Burridge*, I can properly give no costs on either side. As regards Mr. *Burridge*, the comments I have made on the transactions themselves, and the relation in which he stood to the Plaintiffs, make it impossible for me, not only to give him any costs, but, if the transactions had been such as the Plaintiffs represented it, or even if they had plainly narrated the real facts, stating the full extent of their own knowledge, it would have been difficult for me to avoid giving them the costs. But, on the other hand, the Plaintiffs have disentitled themselves to receive any costs, by reason of the unfounded charges they have brought against Mr. *Burridge*, and of which, under ordinary circumstances, they would have had to pay all the costs. And although, unquestionably, this Court holds that it is highly improper for a solicitor to derive a personal advantage in the shape of gifts from his clients, or in the shape of the liquidation of his bills untaxed and undelivered, still the Court cannot approve of clients entering into transactions with their solicitor, whereby they obtain from him present relief, and, at the same time, indulge the expectation that the Court will afterwards, at their instance, annul the whole transaction on the ground of the relation subsisting between them.

I propose to make one decree in both causes. As regards Mr. *Gardener* I see nothing but what is straight-forward

forward in his conduct, and he must have his costs of both suits.

The Plaintiff must therefore pay the costs of the Defendants, other than Mr. *Burridge*, in the suit of *Humby v. Moody*; but in the suit of *Gardener v. Ennor*, the Plaintiffs in that suit must pay the costs of the *St. Cuthbert Company* and of *Moody* and *Smith*, the first mortgagees.

1866.

GARDENER
v.
ENNOR.
HUMBY
v.
MOODY.

CALCRAFT v. THOMPSON.

THIS suit was instituted to restrain the invasion of ancient lights by mandatory injunction, the alleged obstruction having been completed before the bill was filed.

Mr. *Selwyn*, Mr. *Cleasby* and Mr. *Bristowe* for the Plaintiff. *Johnson v. Wyatt (a)*; *Tapling v. Jones (b)*; *Gale v. Abbot (c)*.

Mr. *Hobhouse* and Mr. *Humphrey* in the same interest.

Mr. *Leigh* and Mr. *Southgate*, *contra*, were stopped by—

The MASTER of the ROLLS, who said, that, in his opinion, no case was made for an injunction; and as to the question of damages, that he desired the cause to stand over until the Lords Justices had decided, in *Durrell v. Pritchard*, whether a bill will lie for damages when the Court refuses the injunction.

1865.
July 14.
1866.
Feb. 9, 13.
A suit cannot be sustained in this Court for the purpose of recovering damages for an invasion of ancient lights when the injunction is refused.
Deere v. Gucst, 1 *Myl. & Cr.* 516, observed upon.

The

(a) 2 *De G., J. & S.* 18.
(b) 13 *W. R.* 617.

(c) 10 *W. R.* 748.

1866.

 CALCRAFT
 v.
 THOMPSON.
 Feb. 9.

The Lords Justices having decided the appeal in *Durrell v. Pritchard (a)*, the case was brought on again.

Mr. *Selwyn*, Mr. *Cleasby* and Mr. *Bristowe* for the Plaintiff.

Mr. *Hobhouse* and Mr. *Humphrey* for Defendants in the same interest.

Mr. *Southgate* and Mr. *Cotton*, for the other Defendants, were stopped by—

The MASTER of the ROLLS, who said he would read the evidence again with reference to the observations of the Lords Justices.

The MASTER of the ROLLS.

Feb. 13.

I have again gone over the evidence, with a view to consider whether the damage in this case is such as amounts to the "very serious damage which would arise from the interference of this Court being withheld," mentioned by Lord Justice *Turner* in his judgment in *Durrell v. Pritchard (a)*, as justifying the interference by way of mandatory injunction, and I am of opinion that the damage does not, in that view of the case, in my opinion, justify the interference of this Court.

I may however, without impropriety, observe, that I think that his Lordship did not, in commenting upon *Deere v. Guest (b)*, sufficiently take notice that the decision,

(a) 35 L. J. (Chanc.) 223.

(b) 1 Myl. & Cr. 516.

decision, in that case, was not given on an application for an injunction, but that it was on demurrer, and that the Lord Chancellor decided, that, in such a case, no relief at all could be given. Having been counsel in that case, I cannot doubt that the Lord Chancellor intended to lay down the principle, that if the injury was completed before the bill was filed, the jurisdiction of this Court did not arise, and that the only remedy was at law; and I remember well that Mr. *Jacob* urged strongly on Mr. *Mylne* the necessity of reporting the case, as one that laid down a great and broad principle applicable to all cases of mandatory injunction. In future, no doubt, I shall regard that case in the light in which it is estimated by the Lord Justice *Turner*; but it is to be observed, that it is difficult to consider that the injury was slight in that case, where a railway was made, by collusion with the tenant, across the fields of the Plaintiff, shutting up, as will appear by the bill, though not so stated in the report, a road, which was one of the principal modes of access to his farmhouse.

It is true that, in that case, as I was afterwards informed, the Plaintiff in equity obtained at law full compensation for the damage sustained, including in it the costs of the proceedings in equity, besides also judgment in ejectment, which was not executed, because the parties came to terms of compromise.

The case of *Durrell v. Pritchard* confirms me in my view, that suits cannot be instituted in this Court for the purpose of recovering damages when the injunction is refused, and accordingly I am of opinion that, in this case, the bill must be dismissed with costs.

NOTE.—Affirmed by the Lord Chancellor 19th January, 1867 (15 W. R. 387).

1866.

—
CALCRAFT
v.
THOMPSON.

1866.

Feb. 15.
March 6.

A testator gave his real and personal estate to trustees in trust, but with the consent of his widow, to sell and invest the produce and pay the income therefrom and of his estate unsold to his widow for life, and after her death, he directed that the money to be produced by his estate, "sold before her death," should be in trust for such persons as she should by deed or will appoint: *Held*, that the widow's power did not extend over real estate not sold during her life.

"Effects" held to be *ejusdem generis*, and not to apply to real estate.

CROSS v. WILKS.

THE testator, by his will, gave his real and personal estate to two trustees (*Jacksons* and *Wilks*) and their heirs, upon trust, after paying his debts, funeral and testamentary expenses, that they "should, with the consent and approbation in writing of his wife *Elizabeth*, at such time or times as she and they might think most advantageous, with such consent as aforesaid, during her life, sell and dispose of his said real estate (if any) and also his personal estate and effects (except such part or parts of his household furniture, plate, linen, china and effects, which his wife *Elizabeth* might select for her own use) not being then already in money or money securities." And to invest the money arising from such sale or sales, together with what other moneys might come to their hands under his will, upon government or real securities in *England*. And to pay the dividends and interest of the moneys arising therefrom, and the interest, dividends or yearly proceeds of all other moneys, and the rents, issues and profits of his real estate (if any) until the same should be sold, unto his wife *Elizabeth* during her life for her separate use. "And from and after the decease of his wife, then he directed that all and every the moneys to arise or be in any way produced by or out of his estate, effects or property whatsoever sold before her decease, and the furniture and other effects retained by her for her use, when sold after her decease, should be upon trust for all or any person or persons she, his said wife *Elizabeth*, should, by deed or will, direct or appoint, give, devise or bequeath the same," and in default of such direction, upon trust to pay

pay and divide the same between his brothers. He authorized his wife to select, for her own use, such articles of his household furniture or any other effects which he might die possessed of. And he further directed that no sale or sales of his said estate or effects should be had, without the consent of his said wife being first obtained, until after her decease.

1866.

CROSS
v.
WILKS.

The testator appointed his wife sole executrix, and he died in 1855, seised of some freehold property in *Marston and Stand Street*.

The widow entered into possession of the real and personal estate and treated the whole as belonging to her absolutely. The trustees never interfered or took any part in the administration. The widow died in 1864, having, by her will, devised the *Marston* and *Stand Street* property to the Defendants. The heir-at-law of the testator, however, contended that the widow had no power to devise these real estates which remained unsold at her death.

Mr. Swanston for the Plaintiff.

Mr. Surrage for Defendants in the same interest as the Plaintiff.

Mr. Baggallay and Mr. Field for the heir-at-law.

Mr. Swanston in reply.

The MASTER of the ROLLS.

In this case, the question, which arises on the will of *Joseph Jackson*, is, whether his wife has, under the words of his will, power to dispose, by will, of such portion

Mar. 6.

1866.

CROSS

v.

WILKS.

portion of his property as was not sold or converted into money during her lifetime.

That it was the testator's intention that his widow should have the absolute control over all his property I cannot doubt. I think it would be too capricious an intention to attribute to him to suppose that he intended that his wife should have the power of disposing of his property, if converted into money, but no such power, if it remained unconverted, while the power of converting the whole or any part into personalty depended exclusively on her own will and pleasure.

But even so assuming it, I cannot get over the words of the testator *quod voluit non dixit*.

The words of the will are these : "all and every the money to arise or be in any way produced by or out of my estate, effects or property whatever sold before her decease." So far the words are precise, and the power is confined to the money arising from the sales "before her decease." He goes on : "and the furniture and other effects retained by her for her own use, when sold after her decease." Therefore there are two classes of things given, the money produced by the sale "before her decease," and the furniture and effects "retained by her for her own use when sold after her decease." A good deal of argument was founded on the word "effects," which occurs twice; but I am of opinion that it is impossible to apply the word "*effects*" to real estate. I think that it must be treated as a word *ejusdem generis* with the "furniture," which was retained by her for her own use, and that it cannot extend to real estate. The proof of it is, that when the word "effects" is mentioned a second time, he authorizes his wife "to select for her own use such articles of his household furniture

or

or any other *effects* which he might die possessed of." There it clearly means "effects" of a like nature.

1866.

CROSS
v.
WILKS.

The testator might possibly have thought, that if she intended to dispose of it by will, she might have directed the sale, and that if she wished the property to go to his heir-at-law, she might withhold her consent. It is, however, impossible to speculate on his intention; but this is certain: she died intending to dispose of it by will, because she has expressly said so. I think however she had no power to do so, and that to have enabled her it must first have been converted.

I must declare that the heir-at-law is entitled to this real estate.

DUNBALL v. WALTERS.


1865.
June 15, 24.

THE Plaintiff's property in *Shoreditch* was separated from the Defendants' by a wall nineteen feet high, and the windows of the Plaintiff's houses, which were alleged to be ancient lights, overlooked the Defendants' premises.

An act of parliament alone can give any person the right of taking the property of another without his consent on payment of an adequate pecuniary compensation, and the right to light and air is as much property as the land which enjoys this easement on the land of another.

On the 10th of *May*, 1865, the Defendants pulled down the wall with a view to erect a large warehouse on their premises, and notwithstanding the Plaintiff's remonstrances and threats, they had, at the filing of this bill (29th of *May*, 1865), raised the wall to the height of thirty-five and one-third feet.

The bill prayed an injunction to restrain the Defendants from erecting the building of a greater height than it was originally, and from permitting the wall already erected from remaining a greater height than it lately stood

1865.

 DUNBALL
 v.
 WALTERS.

stood, and from erecting on the Defendants' land any wall, &c. of a greater height than the elevation of the old buildings as they lately stood, so as to darken or obscure or impede the light and air theretofore enjoyed by the Plaintiffs.

A motion was now made for an injunction, the Defendants having previously given an undertaking not further to raise the height of the party wall.

Mr. *Southgate* and Mr. *Ince* for the Plaintiff.

Mr. *Selwyn* and Mr. *Renshawe* for the Defendants.

Mr. *Southgate* in reply.

Ranken v. Huskisson (a); *Attorney General v. Nichol (b)*; and *Isenberg v. East India House Estate Company (c)*, were cited.

The MASTER of the ROLLS.

June 24. This is an application for an injunction. In truth no such injunction as is here prayed is resisted, because before the motion was made the wall was carried to its present height, and it is not intended by the Defendants to raise it higher. The great object of the present motion however is, to prevent the Defendants hereafter, at the hearing of the cause, from urging as a defence to a mandatory injunction to restore the property to the same state in which it was before the wall was begun to be raised, the hardships and expense which would be entailed on the Defendants by the necessity of pulling down a large and extensive warehouse which they are now in the course of completing.

The

(a) 4 *Sim.* 13.
 (b) 16 *Ves.* 338.

(c) 10 *Jur. (N. S.)* 221.

The Plaintiff alleges, that at the time of the filing of the bill and service of the notice of motion, not only the wall was not completed, but the whole might have been restored to its former state for a few pounds. And that even when the undertaking was given by the Defendant, a comparatively small sum would have restored the property to its former state, but that the subsequent works, although they add nothing to the obstruction of light and air already effected, will add much to the expense of restoring the property to its original state. They stated that, when the undertaking was given, the building was a mere carcase, with four bare walls and an unfinished roof, but that by the time this case will be heard, the whole building with floors, windows, doors, plastering and painting will have been completed, and that it is probable that the Defendants, if the Court should be disposed to decide against them on the merits, will, in resisting any decree for a mandatory injunction, have a strong argument *ad misericordiam* to urge against such a proceeding, and to induce the Court to leave the Plaintiffs to compensation in damages, instead of compelling the Defendants to restore the property *statu quo fuit*.

Certainly many of the observations made in some of the later cases in Chancery seem to point in that direction, but I must state my opinion to be, that an act of parliament alone can give any person the right of taking the property of another without his consent, although it be intended to be taken only on payment to him of an adequate pecuniary compensation.

I must also state my opinion, that the right of obtaining air and light over the land of a neighbour, which has, by lapse of time, become indefeasible, is as much property as the land itself which enjoys this easement over the land of another.

I have,

1865.
DUNBALL
v.
WALTERS.

1865.
DUNBALL
v.
WALTERS.

I have, therefore, though prematurely, because I am rather trenching upon the province of the judge who will have to dispose of this case at the hearing, examined into the evidence to see how the matter stands in this respect. In my opinion it stands very differently from the case of *Durrell v. Pritchard* (a) which I disposed of in the early part of this month. There, the matter was begun in *July*, was carried up to its extreme height on 5th *September*, was completed shortly afterwards, but no bill was filed until the month of *February* following.

In this instance, the Defendants raise a case of acquiescence on the part of the Plaintiff, which is founded upon this: that the Plaintiff's husband was invited to inspect the plans and to ascertain what the intended elevation was to be. At the same time that this was done, he was also assured that the intended building would not, to any appreciable extent, diminish the access of light and air to the back windows of his house. I think when such a statement is made, and such an inspection offered, it is the duty of the person to whom the offer is made to examine the plans and ascertain what appears upon them. The Plaintiff (assuming what is not the case, the Plaintiff and her husband to be in the same position) did not do so. I have desired these plans to be shewn to me, and I am bound to say, that I am unable, from them, to ascertain the height that the wall in question was intended to be raised, and it is my opinion, that to the Plaintiff or to me the inspection of the plan would have shewn nothing. I think, therefore, that no case of acquiescence can be raised on this head.


Upon the rest of the evidence, I am of opinion that
the

(a) 34 *L. J. (N. S.) Ch.* 598, and 35 *L. J. (N. S.) Ch.* 223.

the Plaintiff's husband interfered the moment that it appeared that the wall would be raised to such a height as to interfere with the light and air hitherto enjoyed. I am also of opinion, on the evidence, that the wall was not completed when the bill was filed, and when the Plaintiff had notice of the motion. I am also further of opinion, that the erection in question does materially interfere with the access of light and air to the windows at the back of the houses of the Plaintiff. It is true that the light and air they enjoyed previously was but small, but I am satisfied that that little has been seriously diminished, and that the contention of the Defendant, that the slight throwing back of the wall at right angles to the wall complained of, whereby a small additional lateral light is admitted, is no compensation for the additional nine feet that the wall complained of has been raised.

Taking all these things into consideration, it would appear to me by no means improbable that, at the hearing of the cause, I should make an order for an injunction in a mandatory form, which would have the effect of causing the demolition of a large portion of the building now in course of completion ; unless, indeed, the *dictum* of the Court, which I have already referred to, should be settled to be, that in such cases compensation alone can be afforded. I state this view, in order, if possible, to enable the parties, if they think proper, to come to some amicable settlement of this matter. But, on the present occasion, I shall merely continue the Defendants' undertaking, which will in no respect prevent their going on to complete the building internally; but I think it my duty to warn them, that they will not, before me at the hearing of this case, have obtained any advantage over the Plaintiff
by

1865.


DUNBALL
v.
WALTERS.

1865.

DUNBALL

v.

WALTERS.

by reason of their having so done, and I shall make the costs of this motion costs in the cause.

NOTE.—The following are some of the modern authorities on the subject:—*Cooper v. Hubbuck*, 30 *Beav.* 160; *Cotching v. Bassett*, 32 *Beav.* 101; *Jacomb v. Knight*, 32 *L. J. (Chanc.)* 601; *Iseberg v. The India House Company*, 33 *L. J. (Chanc.)* 392; *Johnson v. Wyatt*, 33 *L. J. (Chanc.)* 394; *Jackson v. Duke of Newcastle*, 33 *L. J. (Chanc.)* 698; *Yates v. Jack*, 35 *L. J. (Chanc.)* 539; *Durell v. Pritchard*, 34 *L. J. (Chanc.)* 598, and 35 *L. J. (Chanc.)* 223; *Lawrence v. Austin*, 34 *L. J. (Chanc.)* 598; *Weatherley v. Ross*, 1 *Hem. & M.* 349; *Clarke v. Clark*, 35 *L. J. (Chanc.)* 151; *The Carriers' Company v. Corbett*, 13 *L. T.* 154; *Stokes v. The City Offices Company*, 13 *L. T.* 81; *Smith v. Owen*, 35 *L. J. (Chanc.)* 317; *Robson v. Whittingham*, 35 *L. J.* 227; *Lyon v. Dellimore*, 14 *L. T.* 183; *Dent v. Auction Mart Company*, 2 *L. Rep. (Eq.)* 338; *Webb v. Hunt*, 12 *Jur. (N. S.)* 558; *Waterlow v. Bacon*, 12 *Jur. (N. S.)* 614; *Martin v. Headon*, 12 *Jur.* 387; *Calcraft v. Thompson*, *ante*, p. 559; *Taplin v. Jones*, 11 *H. of L. Cas.* 290; *Lanfranchi v. Mackenzie*, 36 *L. J. (Chanc.)* 518.

1866.

June 1, 5.

BENYON v. FITCH.

A mortgage of a reversionary interest stands in the same position as a sale, and therefore to support the transaction the mortgagee must shew that he gave full value.

THIS bill prayed a declaration that a mortgage of a reversionary interest, dated the 26th of April, 1862, ought to stand only as a security for the money actually advanced and interest, and for a reconveyance upon payment of the amount.

The circumstances were these:—The Plaintiff was entitled,

A mortgage of a reversionary interest, depending on a gentleman dying without issue male, set aside for inadequacy of consideration, although the risk was such as not to be susceptible of accurate valuation.

Loans were made to a young man on his bills at exorbitant interest, and when they were about to become due, he mortgaged his reversionary interest to secure the amount and a further advance. The mortgage being set aside for inadequacy, held that the mortgagee was entitled to the full amount of the bills and not simply to the money actually advanced on them.

On setting aside the sale of a reversion for inadequacy after four years, the purchaser is not entitled to any allowance for the risk he has ran in the meantime.

On setting aside the purchase of a reversion for inadequacy, the deed stands as a security for the money actually due, and if it be not paid, the bill stands dismissed, which is equivalent to a foreclosure.

entitled, for his life, in remainder, expectant on the death of *David Pugh*, and in default of male issue of *David Pugh*, to certain real and personal estate producing an income of about 4,000*l.* a year.

1866.

~
BENYON
v.
FITCH.

In *October*, 1861, the Plaintiff, then of the age of twenty-six, had lately quitted *Oxford* and was in pecuniary difficulties. He applied to an intimate acquaintance to assist him in obtaining money. This friend introduced him to *Collett* and *Collett* introduced him to the Defendants Messrs. *Fitch*.

In *November*, 1861, the Defendants discounted the Plaintiff's bill for 350*l.* at three months, and they retained 50*l.* for interest and 50*l.* nominally for costs.

This bill became due in *February*, 1862, and the Plaintiff was unable to pay it; the Defendants thereupon renewed it for three months, upon the Plaintiff's giving an additional bill for 150*l.*, out of which they retained 100*l.* for discount. So that, as between these parties, the Plaintiff received only 300*l.* in respect of his 500*l.* bills; in addition to this the money passed through the hands of *Collett* who retained a large sum nominally for his trouble.

The Plaintiff, unable to pay these bills and requiring a further advance, agreed to mortgage his reversionary interest to the Plaintiff, and, by an indenture dated the 26th of *April*, 1862, and made between the Plaintiff of the one part, and the Defendants of the other part, the Plaintiff, in consideration of 1,000*l.* expressed to be paid to him by the Defendants, conveyed to them the freehold and personal property to which he was entitled for life expectant on the death of *David Pugh* without issue male, subject to redemption in three events, *viz.*, if the Plaintiff should pay the Defendants 8,500*l.* on the death
of

1866. of *David Pugh* or should, before the 1st of *May*, 1863,
 ——— pay the Defendants 2,000*l.* or should, on or before the
 BEYERS 1st of *May*, 1864, and in the lifetime of *David Pugh*,
 v. pay the Defendants 3,000*l.*
 1872.

The Plaintiff covenanted with the Defendants absolutely, and, with reference to the contingency, that he would, on the death of *David Pugh* (in case the Plaintiff should not have paid the sum of 2,000*l.* or 3,000*l.* as thereinbefore provided), pay to the Defendants 8,500*l.*

The 1,000*l.* expressed to be paid to the Plaintiff was paid as follows:—his bills for 350*l.* and 150*l.* were handed back, 470*l.* were paid and 30*l.* retained for costs, of which 10*l.* were afterwards returned.

At the execution of the mortgage, the Plaintiff also accepted another bill for the Defendants for 350*l.*, because the other bill was in the hands of a third party, but this was simply for the accommodation of the Defendants.

In *December*, 1864, the Plaintiff offered to repay the 1,000*l.* with 8*l. per cent.* interest and costs and any sums paid for insurance, but which was refused.

On the 6th of *February*, 1865, the Plaintiff instituted this suit for the purpose above stated.

David Pugh was still living.

Evidence was entered into as to value, but the Court held that the Defendants had failed in proving that they had given full consideration for the mortgage.

Mr. *Southgate*, Mr. *Jessel* and Mr. *Rawlinson* for the
 Plaintiff.

Plaintiff. The mortgagee of a reversionary interest is bound to shew that he has given full value; a mortgage in that respect is a sale *pro tanto* of the reversion; *Bromley v. Smith* (a). Here, the Defendants have totally failed in proving that they gave full value, and the obligation to pay is not upon the happening of the contingency, but is absolute to pay on the death of *David Pugh*. The mortgage being set aside, the account must be taken from the beginning, and the exorbitant charges on the bills disallowed, as was done in *Croft v. Graham* (b). They also referred to *Tottenham v. Emmet* (c).

1866.

BENYON
v.
FITCH.

Mr. *Selwyn* and Mr. *Cotterell*, for the Defendants, argued that, having reference to the nature of the contingency, *viz.*, death without issue male, which, even according to the Plaintiff's witnesses, was not susceptible of valuation, the full value had been given. That the bill transactions were now, since the abolition of the usury laws, perfectly valid, and during the panic the *Bank of England* had advanced money at 10*l. per cent.* Consequently the full amount of the bills must be allowed, even if the mortgage did not stand, and that an allowance ought to be made for the risk and peril the Defendants had run of losing their money, by the happening of the event which would destroy the Plaintiff's interest. They cited *Perfect v. Lane* (d); *Headen v. Rosher* (e); *Gowland v. De Faria* (f); *Earl Aldborough v. Trye* (g); *Tynte v. Hodge* (h).

Mr.

- | | |
|--|--|
| (a) 26 <i>Beav.</i> 644. | (e) <i>M'Clelland & Younger</i> , p. |
| (b) 2 <i>De G., J. & S.</i> 155. | 100. |
| (c) 11 <i>L. T. (N. S.)</i> 404, and | (f) 17 <i>Ves.</i> 20. |
| 12 <i>L. T. (N. S.)</i> 838. | (g) 7 <i>Cl. & Fin.</i> 436. |
| (d) 30 <i>Beav.</i> 197, and 3 <i>De</i> | (h) 2 <i>Hem. & M.</i> 287. |
| <i>G., F. & J.</i> 369. | |

1866.

 BENYON
 v.
 FITCH.

Mr. Southgate, in reply, referred to *Talbot v. Stanforth*(a); *Chestefield v. Janssen* (b); *Baker v. Bent* (c).

June 5.

The MASTER of the ROLLS.

This is a suit to set aside a mortgage of a contingent reversionary interest to secure a large sum of money. The law upon the subject is clearly settled. It is clear that a mortgage of a reversionary interest stands in exactly the same position as a sale of a reversionary interest, and that if it is complained of, the burthen lies upon the mortgagee or purchaser to prove that he gave a fair and proper price for it. It is also established, that the modern alteration with respect to the usury laws does not affect this question.

The nature of the case is this :—in *April*, 1862, the Plaintiff owed the Defendants 500*l.* upon bills. They had advanced only 350*l.* upon them, but still that was a perfectly legal transaction, and 500*l.* were due upon those bills. Upon the 26th of *April*, 1862, the transaction in question took place. The bills were not all then due; they did not become due until the 11th of *May*, 1862. The Plaintiff then received, nominally, 1,000*l.*, and he secured 8,500*l.* upon the reversionary life interest to which he would become entitled, if his uncle, who was then fifty-six and had not married, should die without male issue. The income of the property was a little more than 4,000*l.* a year. In that state of the case, the Plaintiff comes to set this transaction aside, and there is

(a) 1 *John. & H.* 484.
 (b) 1 *Atk.* 340.

(c) 1 *Russ. & M.* 224.

is this peculiarity:—he does not come to set it aside after the reversion has fallen in, and after he has taken the chance of the contrary result (which is what most persons do), but he files his bill on the 6th of *February*, 1865, to set aside the transaction, while the risks are still continuing and going on. The Defendants, instead of acceding to this, insist that they are entitled to retain the bargain. I think it has been well observed in these cases, that there are some instances in which it is impossible to ascertain the real value of the reversionary interest, unless it is sold by auction, and I think that this is one of those cases.

1866.


BENYON
v.
FITCH.

I am of opinion that the Defendants fail in proving that they gave the full consideration, and I doubt whether it would have been possible for them to have proved it, for the nature of the transaction itself is such as to throw great difficulties in their way. They have examined three actuaries on the subject, for the purpose of shewing what ought to be the post obit sum to be paid for 1,000*l.* advanced. One of them says it should be 8,857*l.* and another 8,264*l.*, both of which is below the sum contracted to be given by the Plaintiff, the third (Mr. *Jellicoe*) states that it ought to be 9,666*l.*; but his mode of stating it takes away the effect of his evidence: it is this:—he considers it to be of that value, provided the policies of insurance which have been made upon the Plaintiff's life should be given up to him at the end of that period, when, of course, they would be of very considerable value. But it is not incumbent on the person who has advanced the money to effect any policy of insurance, and, as far as I understand, no policy whatever has been effected, and I assume that, if any had been, evidence would have been given to that effect. The policy would be to this effect:—a policy that the Plaintiff would survive his uncle for a sufficient number
of

1866.

BENYON

v.

FITCH.

of years to repay the 8,000*l.* together with interest from the death of the uncle, and apparently three years would have been amply sufficient for that purpose.

But there is another circumstance in this case, which tells very strongly against the Defendants, which is this: they insist, and the actuaries appear to proceed upon that fact, that they are entitled to be repaid for the risk they have run, and though the risk has turned out to be nothing, that they are entitled to be paid for it. For instance, the transactions took place on the 26th of *April*, 1862, and the offer to repay them was made in *December*, 1864; therefore there were two years and about nine months during which they have run the risk, and they say they ought to be repaid for the risk during that time, because the Plaintiff might have died during that period, and that they ought to be indemnified. Accordingly that seems to have been the way in which the actuaries have made out a calculation about being redeemed at the end of four years.

But then comes this transaction :—the Plaintiff was to receive back all his bills and to be paid the balance of the 1,000*l.* He was paid the balance of the 1,000*l.*, and he had his bills returned to him, but only upon his renewing one and accepting another bill—a bill of 350*l.*—for which he ran the risk up to the 14th of *May*, 1863. He therefore ran the risk for about a year upon this bill, that is, if any misfortune had happened to the Defendants, he would have been liable to pay that bill in the hands of a *bonâ fide* holder. Now that again makes a very serious alteration in the transaction, because it is not merely the giving up of the bills and the payment of the 1,000*l.*, but it is the payment of the balance of the 1,000*l.* and the giving up of the bills at the end of a year and eighteen days, provided in the meantime, the
persons

persons who have got the purchase-money meet with no accident, such as death, bankruptcy or the like, which would make them unable to pay the bills.

1866.

~
BENYON
v.
FITCH.

In addition to this, there is also this circumstance in the present case:—in most of these cases, as far as I can find from those I have examined, the covenant is to pay upon the contingency occurring; but here it is absolute, and that the Plaintiff shall pay the 8,500*l.* at all events. I doubt whether you can properly take into consideration the fact of whether it is likely that the Plaintiff would or would not be able to pay that sum, if the contingency did not fall in; but if I am to take that into consideration, I see no reason to shew me why he should not be able to pay it.

In that state of circumstances, after the transaction had taken place two years and eight months, the Plaintiff offered before any accident occurred to repay the 1,000*l.*, which was more than he had received, and 5*l. per cent.* That offer was refused. A month later, he offers to repay the money with 8*l. per cent.*, and also any costs that may reasonably have been incurred for the purpose of setting the matter right, and the insurance if any. That also is refused. I think the Defendants were ill advised not to accept that offer, and, in my opinion, that is more than they were entitled to obtain.

I think, after considering the matter very fully, that I cannot make the same decree as was made in one or two of the cases, that is to say, to take an account simply of what was the amount that was actually paid. I think I must treat the sum advanced as 1,000*l.*, and the bills for 500*l.* as good and *bond fide* bills, having regard, it is true, to the very large discount which was

1861.
 ~~~~~  
 HARTON  
 v.  
 FARM.

THE COURT: But the repeal of the usury laws makes this valid.

I am of opinion, therefore, that the Defendants are entitled to have the 1,000*l.* with 5*l.* per cent. interest, which is the rate which the Court gives on setting aside transactions of this description; but as they refused that offer and a much larger one before the bill was filed, and made it necessary to file this bill, and have put the parties to this expense, they must pay the costs of the suit.

If the amount be not paid, then the bill will be dismissed, and the Defendants will get a foreclosure; it is exactly like a bill to redeem.

---

NOTE.—See the 31 *Fict.* c. 4.

---

1863.

### DOWN v. ELLIS.

Nov. 22, 23.

The Court will not act on the unsupported testimony of a person in his own favor.

Money, which was standing in the funds in the name of a married woman, was claimed, after her decease and that of her husband, by her mother, as having been invested by her

THE Plaintiff, Mrs. *Down*, married in 1800. The marriage was an unhappy one, and in 1802, and immediately after the birth of their daughter, she and her husband ceased to live together.

She supported herself and made savings, and in *January*, 1831, she invested a sum of 200*l.* in the funds in the name of her daughter. A second transaction of the same description afterwards took place. In 1832 the daughter married the Rev. *Thomas Owen*, and the stock was transferred into the name of the married daughter.

In while separated from her husband in her daughter's name. The only evidence of the trust was the affidavit of the mother and proof that the dividends had been received by her with the assent of the daughter and her husband. The Court *held* the claim of the mother established.

In 1838 three further sums were invested in the funds in the same name. Mr. *Down* died in 1839, the daughter, Mrs. *Owen*, died in 1860, and Mr. *Owen* died in 1862. At the death of the daughter the fund consisted of 600*l.* New £3 per Cent. standing in the daughter's name.

1865.

Down  
v.  
Ellis.

It did not appear, independently of the Plaintiff's affidavit, how the dividends had been dealt with down to 1838, but, in that year, Mr. and Mrs. *Owen* executed a power of attorney enabling *John Baker* to receive the dividends, which were paid over to the Plaintiff down to the year 1864.

The Defendant, the executor of Mr. *Owen*, who was also the administrator of Mrs. *Owen*, then claimed the 600*l.* stock as part of Mr. *Owen*'s personal estate. In consequence of this claim, the Plaintiff instituted this suit, praying a declaration that the 600*l.* stock belonged to her and to have it transferred to her. She stated as follows :—

“The Plaintiff, while living apart from her husband, acted as housekeeper in various families of distinction, and by that means not only supported herself but saved money. These savings she from time to time invested in the funds, the stock being purchased in the name of her daughter, *Georgiana Frances Down*, in order to prevent it from the interference of the Plaintiff's husband. *Georgiana Frances Down*, from the time of her father's desertion of his family until her marriage, supported herself as a governess and even saved money out of her earnings. These savings she invested in her own name, in the same stocks in which the Plaintiff invested her savings, so that the aggregate of the two classes of savings made one fund. The agreement between the Plaintiff and her daughter was, that the dividends of the whole



1865.

Down

v.

ELLIS.

whole fund should be paid to the Plaintiff *during the joint lives of* the Plaintiff and her daughter, and that *the survivor should* take the whole capital. This was never reduced into writing, but was distinctly agreed between the Plaintiff and her daughter; as the difference in age between the Plaintiff and her daughter was some thirty years, the chances were much against the Plaintiff's being the survivor."

The only evidence of this trust was the affidavit of the Plaintiff, which however was corroborated by the circumstances of her receipt of the dividends, with the assent of the daughter and her husband.

The Defendant said as follows:—"I find no mention amongst the papers of the said testator, of any such arrangement as that alleged by the said bill to have been made with reference to the said sum of 600*l.* £3 per Cent. Bank Annuities, nor anything to shew that the Plaintiff has or ever had any interest whatever therein, and I am wholly ignorant of the alleged matters upon which the Plaintiff founds her claim to be entitled to the Bank Annuities." He insisted on the Statute of Frauds, there being no trust manifested and proved by any writing signed by the testator and his wife.

Mr. *Baggallay* and Mr. *Wickens* for the Plaintiff.

Mr. *Speed*, *contra*, for the executor of the husband.

There is nothing but the affidavit of the Plaintiff to support her claim to these funds standing in the name of her daughter. There is no independent proof that the money belonged to the mother, or that there was any such agreement as that stated by her. The Court cannot act on such evidence; *Nunn v. Fabian* (a). There is

no

(a) 35 *Law J. (Chanc.)* 140.

no evidence of any declaration of the daughter, or that she did not receive the dividends from 1831 to 1838.

1865.

DOWN  
v.  
ELLIS.

Secondly, the purchase of the stock by a parent in the name of the child was an advancement, which is not rebutted by her receipt of the dividends; *Sidmouth v. Sidmouth*(a); *Williams v. Williams*(b); *Grey v. Grey*(c).

As regards 200*l.*, a portion of this fund, it is admitted that it belonged to the daughter.

*The MASTER of the ROLLS.*

I think that the preponderance of the evidence is in favor of the Plaintiff. I quite assent to the statement:—that the Court cannot act on the unsupported testimony of a person in his own favor. Were it otherwise, in the course of the administration of a testator's estate in the Court, any person might come in and say the testator owed me 1,000*l.*, and substantiate it by his own unsupported oath. It never is my practice to allow a claim upon the unsupported testimony of the claimant (d), there must be some attendant circumstances, or some facts established *aliunde*, which corroborate the claim, and these may be rebutted by the other side.

The present claim, therefore, is to be established independently of the testimony of the Plaintiff. The facts are these:—In 1831, when the first transaction took place, the Plaintiff, a married woman, who had been abandoned

(a) 2 *Beav.* 456.  
(b) 32 *Beav.* 370.  
(c) 2 *Swan.* 594.

(d) *Grant v. Grant*, 34 *Beav.* 623.

1865.

DOWN  
v.  
ELLIS.

abandoned by her husband and was living with her only daughter, makes an investment of 200*l.* in the name of her daughter. It is obvious that it could not safely be made in the name of the mother, as the husband might, in that case, have taken the money, and it is not too much to assume that they believed that he would have done so. The only protection for the mother was, to invest it in the name of the daughter. A second transaction of the same description took place, and the year after the daughter married. Now I must assume that the daughter's husband knew that these sums had been invested in his wife's name. It is certain that he knew it six years after, for he executed a power of attorney to enable the bankers to receive the dividends.

I do not know whether it is proved that the dividends were received by the Plaintiff up to that time, but this is proved:—that the husband of the daughter did not touch any money, and this is certain:—that if it had been his wife's money he might have taken it. All this is in favor of the statement in the Plaintiff's affidavit, and it is not probable that a Welch clergyman, who does not appear to have been wealthy, should not touch the money, if really his wife's, but allow it to remain in his wife's name. Six years afterwards, and in 1838, three other sums were invested in the name of the clergyman's wife, and there is distinct evidence that the dividends were paid to the mother, because the clergyman and his wife executed a power of attorney to receive the dividends, which were received under it from 1838 to 1862, and paid to the mother for twenty-four years. All the investments were made during the life of the Plaintiff's husband who died in 1839, and while there was therefore an obvious motive for investing the money in the name of the daughter. If it belonged to the daughter, why did not her husband have it

it transferred into his own name? The inference is this:—that he considered it trust money invested in the name of his wife. The daughter died in 1860, and he died in 1862, but he took no proceedings to take possession of the fund, and he allowed the dividends to be received by the Plaintiff during his life. The conclusion is, that he considered it the Plaintiff's money. The Plaintiff is now ninety years of age and it was reasonable to expect that he would be the survivor.

The Plaintiff's story appears truthful, she does not say that all the 600*l.* was her money, which she might have said, but that this sum arose from the joint savings, and that it was agreed that she should have the dividends for life, and that the survivor should take the principal fund.

I think the evidence is sufficient to establish the case of the Plaintiff, and I will make a declaration accordingly.

---

1865.

Down  
v.  
ELLIS.

BEDFORD v. BEDFORD.

**T**HE testator, by his will dated in 1857, devised and bequeathed his freehold, copyhold and personal estate in trustees, "upon trust, in the first place, by him or him in the years and annual produce, or by sale or other disposition thereof or of any part thereof, or by such other ways and means, as they should think fit him and his heirs, to pay an annuity of 240*l.*, and to pay it to his wife during her life; and subject thereto to raise and pay several legacies, and to invest the surplus of the rents, issues, profits and produce of his real and personal estate. And he declared, that his trustees should stand seized of his real and personal estate (after answering the purposes aforesaid) upon trust, after his wife's decease, to sell his freehold, copyhold and leasehold estates. And he declared his will to be, "that the moneys which should arise by or from such sale or sales aforesaid should be deemed to be part of his personal estate, and should be subject to the dispositions hereinafter made concerning his residuary personal estate;" and that his trustees "should stand possessed of and interested in all his said residuary personal estate, and the money to arise from the sale of his real estate, and the surplus rents, issues, profits and produce thereof respectively, after the decease of his wife, in trust for his two sons *John James Bedford* and *William Bedford* and his daughter *Susan Mary*" absolutely, in equal shares as tenants in common.

The

her death he directed a sale of his real estate, and declared that the produce "should be deemed to be part of his personal estate and should be subject to the disposition" of his personal estate, which he gave to his children. *Held*, that the realty was converted into personality only for the purposes of the will, and that the heir of the testator was entitled to so much of the real estate as had lapsed by the death of a child in the testator's lifetime.

The testator died in 1858, but his son *William Bedford* had previously died a bachelor.

1865.  
BEDFORD  
v.  
BEDFORD.

Two questions arose; first, whether the widow's annuity was payable rateably out of the real and personal estate; and, secondly, whether the one-third share of the produce of the real estate, which lapsed by the death of *William Bedford* in his father's lifetime, was to be considered as real or personal estate.

Mr. *J. H. Palmer* and Mr. *De Gex*, for the Plaintiff (the heir-at-law), argued that the personal estate was the primary fund to resort to for payment of the widow's annuity, and they distinguished this case from the others, by the circumstance that the power of sale did not arise until after the death of the widow. On this point *Boughton v. Boughton* (a); *Tench v. Cheese* (b), were referred to.

Secondly, that though the testator had declared that the produce of his real estate should be deemed personal estate, still that this conversion was limited to the purposes and for the persons after mentioned in regard to the real estate, and that, to the extent that those purposes failed, the heir-at-law was entitled. On this point *Taylor v. Taylor* (c); *Phillips v. Phillips* (d); *Ackroyd v. Smithson* (e); *Fitch v. Weber* (f); *Williams v. Williams* (g), were cited.

Mr. *Selwyn* and Mr. *Cottrell*, *contra*. First, there is a mixed common fund provided for the payment of the annuity, and it is therefore payable rateably out of the real

(a) 1 *H. of L. Cas.* 406.  
(b) 6 *De G., M. & G.* 453.  
(c) 3 *De G., M. & G.* 190.  
(d) 1 *Myl. & K.* 649.

(e) 1 *Bro. C. C.* 503.  
(f) 6 *Hare*, 145.  
(g) 5 *Law J. (Chanc.)* 84.

1865.  
 ~~~~~  
 BARNES
 2
 BEDFORD.

real and personal estate. Secondly, there is not only an absolute power of sale, by which the real estate is converted into personalty, but there is a positive declaration that the produce of the sale of the real estate shall be deemed part of the testator's personal estate. There is therefore an absolute conversion, and the lapsed share of the freeholds is divisible as personalty amongst the next of kin and the representatives of the widow.

Mr. C. Browne, Mr. W. Rudall and Mr. Babington
 for other Defendants.

The MASTER of the ROLLS was of opinion that the real and personal estate and the rents, issues, profits and produce thereof, respectively, were charged with and formed one common fund for the payment of the annuity of 240*l.* to the testator's widow. Secondly, that *William Bedford's* one-third share of the real and personal estate lapsed by his death in the testator's lifetime, and, so far as the same consisted of real estate, devolved on the Plaintiff as the testator's heir-at-law, and, so far as the same consisted of personal estate, devolved on the testator's widow and his two surviving children, his next of kin.

1866.

WOOD v. WOOD.

THE testator gave his real and personal estate to trustees, in trust, as to his residuary personal estate, for his daughter *Elizabeth* and his five sons by name, and he directed the trustees, out of the rents of his real estate, to pay an annuity to his widow during her widowhood, and to pay and divide the residue of the rents to and among his six children. And after the decease or second marriage of his widow, he directed a sale of his real estate; and he directed that his trustees should stand possessed of the moneys to arise therefrom "upon trust to pay and divide the same equally amongst his said children and the issue of such of them as should die leaving issue, in equal shares as tenants in common, the issue of any such children being respectively entitled, amongst them, to such share only as their, his or her parent or parents would have been entitled to if living."

"Provided nevertheless, and he declared, that in case any of his said sons or his said daughter should die, *either in his lifetime or after his decease*, without leaving any child or children him or her surviving who should live to attain the age of twenty-one years, then and in such case the right, share and interest of any such sons or of his daughter should go to and be equally divided between and amongst such of his children and grandchildren as should be alive at the time of the death of the person last entitled to such share or interest *per stirpes* and not *per capita*."

Feb. 28.

Under a gift to parents, with a gift, by substitution, to their children in the event of such parents dying leaving issue. *Held*, that to entitle the children, the event must happen prior to the period of distribution.

A testator directed his real estate to be sold on the death of his widow, and the produce paid to his six "children and the issue of such of them as should die leaving issue," equally, "the issue of any such children being respectively entitled amongst them to such share only as their parents would have been entitled to if living." The will contained a gift over, in case of any of the children dying in the

The testator's "life-

time or after his decease" without leaving a child. *Held*, that a child who survived the widow became absolutely entitled, and that her children took nothing.

IN EQUITY.
 The testator died in 1855, and his widow died in September, 1864.

VS.
 The testator's daughter, *Elizabeth*, married after his death: she survived the widow and died in November, 1864, leaving three children.

The question was, whether the share of *Elizabeth* was, in equity, personal estate and belonged to her husband, or whether it passed to her three children.

Mr. Bagshawe for the Plaintiff, a son.

Mr. Viner for the other sons and the trustees.

Mr. Broderick, for the husband of *Elizabeth*, argued, that this was an absolute vested gift to the six children, subject to a gift to the issue by way of substitution if any child of the testator died before the period of division, i. e. before the death or second marriage of the widow.

Mr. Dunning for the three children of *Elizabeth*. This is not a gift to a class but to persons *nominatim*, and in substance it is a gift to the parents for life, with remainder to their children; *Wild's Case* (a); *Audsley v. Horn* (b); *Parsons v. Coke* (c). The word "issue" must be construed "children;" *Sibley v. Perry* (d); and that this is the meaning of the testator is shewn both by his reference to their "parents," and also by the subsequent use of the word "children" in the proviso.

The children can only take in one of three ways, that

(a) 6 Co. Rep. 17.

(c) 4 Drew. 296.

(b) 26 Beav. 195, and 1 De G., F. & J. 226.

(d) 7 Ves. 522.

that is, either concurrently, by substitution, or in succession. They cannot take concurrently with their parents, for they are to take the whole share of their respective parents; neither can they take by way of substitution, for the word used by the testator is "and the issue" and not "or the issue" in the alternative. They therefore take by succession, and this is made more clear by the gift to them if their parents "should die leaving issue," which dying is unlimited and cannot be restricted to a death in the widow's lifetime; and besides, the proviso is express, in case any of the testator's children "should die either in his lifetime or after his decease." The gift in case of death without issue cannot be limited, so neither can the terms of the gift in case of death leaving issue; the children, therefore, are entitled on the deaths of their parents, whenever that might happen.

1866.

Wood
v.
Wood.

The MASTER of the ROLLS.

I think it clear that the testator's six children took this property on the death of the widow. All the trusts arise on her death or second marriage, upon which event the property is to be sold and the produce divided.

It is not given to a class, but to the testator's six children by name, and to the issue of such of them as shall die leaving issue. This case is therefore distinguishable from all those cited, because there the children take something during their mother's life and have an interest vested in them, but here, I think, the issue take nothing except in the event of the parent dying before the period of distribution. The testator obviously means this:—I direct the produce of my real estate, which is to be sold after my wife's death or
second

1861
 ~~~~~  
 V. M.  
 L.  
 V. M.

second marriage, to be divided into six shares, and such of my six children as shall be living at the death or second marriage of my widow shall take their sixth share; but if any be then dead leaving issue, his issue shall take the share which his parent "would have taken if living." On the words of the gift, taken literal, there can be no question, for the whole thing is to be determined, and the sale and division is to take place at the death or second marriage of the widow. The real estate is to be then sold and the produce divided into six shares and "paid to and equally divided" amongst his six children if then living.

No question arises as to any child of the testator predeceasing the widow, and therefore the fund is divisible in sixths between his six children.

The only question which arises upon the subsequent proviso is this:—whether it has cut down the plain absolute gift to the six children to an estate for life.

Unless you limit the effect of this proviso to a death before the period of distribution, it will be in direct opposition to the previous gift. The Court, to make the whole of this will consistent, says, that this proviso applies to the event previously mentioned, namely, to the period of distribution, in which case no conflict will arise, and the whole will have a distinct and consistent meaning.

I think this clause provides for the event of any one of his six children dying without leaving a child before the period of distribution, which was possible, and, in that case, his share is given to "such of his children and grandchildren as should be alive at the time of the death

death of the person last entitled to such share or interest *per stirpes*, and not *per capita*."

1866.

Wood

v.

Wood.

This appears to be a distinct and intelligible meaning, and it makes the whole consistent.

I read the gift to the children as taking effect in case of the death of their parents before the period of distribution, and here, the fact of the mother dying after that period and before payment cannot give to the children a right to that to which their mother was already entitled.

I must declare that all the six children of the testator became entitled upon their surviving their mother.

## LLEWELLYN v. ROUS.

**B**Y a marriage settlement, dated in 1797, certain hereditaments were settled on *Capel Hanbury Leigh* for life, with remainders over.

The settlement contained a power authorizing *Capel Hanbury Leigh* to grant leases.

*Capel Hanbury Leigh* died on the 22nd of November, 1860. After his death a question arose, between his representatives and the persons entitled in remainder, whether the estate of *Capel Hanbury Leigh* was entitled to an apportioned part of the royalties payable upon certain mining leases granted by him, in pursuance of the power contained in the settlement of 1797, of certain portions of the estates therein comprised.

Apr. 19, 24.

Royalties payable periodically under leases granted subsequent to the Apportionment Act (1834) by a tenant for life under a power contained in a settlement prior to that act. *Held*, apportionable.

The Apportionment Act (1834) applies both to the case where the instrument creating the life interest is subsequent to that act, and also where the lease is subsequent to it.

One

also where the lease is subsequent to it.

1866.  
  
 LLEWELLYN  
 v.  
 ROUS.

One of such leases was dated the 25th of *May*, 1837, and one half-year's payment of royalties accrued due under such lease on the 25th of *November*, 1861. Another of such leases was dated the 5th of *May*, 1838, and a quarterly payment of royalties accrued due thereunder on the 29th of *November*, 1861. The third of such leases was dated the 24th of *November*, 1846, and a quarterly payment of royalties accrued due thereunder on the 29th of *September*, 1861. The fourth of such leases was dated the 18th of *March*, 1861, and a half-yearly payment of royalties accrued due thereunder on the 29th of *September*, 1861.

The bill prayed a declaration that the quarterly or half-yearly payments of the royalties which accrued due in the months of *September* and *November*, 1861, under these several leases were not apportionable, and that the estate of *Capel Hanbury Leigh* was not entitled to any portion of such royalties.

This question depended upon the construction of the Apportionment Act, 4 & 5 Will. 4, c. 22 (a), which came into operation on the 16th of *June*, 1834.

Mr. Selwyn, Mr. Freeling, Mr. Baggallay and Mr. Upton argued that there was no apportionment. They cited *Re Markby* (b); *Knight v. Boughton* (c); *Fletcher v. Moore* (d); *Plummer v. Whiteley* (e); *Lock v. De Burgh* (f); *Wardroper v. Cutfield* (g).

Mr. Pemberton, for the executors of *Capel Hanbury Leigh*, argued that these rents were apportionable. He referred to the cases already cited.

Mr.

(a) See 2 Chitty's Stat. (3rd edit.) 1137.

(b) 4 Myl. & Cr. 484.

(c) 12 Beav. 312.

(d) 26 Law J. (Chanc.) 530.

(e) John. 585.

(f) 4 De G. & S. 470.

(g) 10 Jur. 194.

Mr. *Jessel*, Mr. *Druce* and Mr. *Hanson* for other parties.

1866.  
  
 LLEWELLYN  
 v.  
 ROUS.

Mr. *Selwyn*, in reply, cited *St. Aubyn v. St. Aubyn* (a).

---

*The MASTER of the ROLLS.*

It is impossible to get over the decided cases, for there are four of them which determine that this is a case for apportionment. I should have no difficulty in coming to the same conclusion as Vice-Chancellor *Wood*, that the act applies to both cases, that is, both where the instrument creating the interest is dated after the statute, and also where the lease which gives rise to the question bears date subsequent to the statute. The act bears that construction, and the only thing against it is the case of *St. Aubyn v. St. Aubyn* (a), which determines, that unless the payments are periodical, the act does not apply; and it is inferred from this, that if you hold that the statute applies to both cases, viz., where the instrument creating the interest and where the lease is after the act, it is very difficult to reconcile that construction with holding that the act applies to royalties, the payment of which depends on the quantity of ores raised. On that I express no opinion. But my opinion is, that the weight of argument is in favor of the statute applying to both cases rather than to one only. This is a remedial act, intended to give to the estate of a tenant for life, who might die before the rent became due, a fair proportion of it down to his death. It is, therefore, to be construed liberally, and I adopt the decision of the Vice-Chancellor *Wood*, and the other decisions which hold that the act applies to both cases.

*Apr.* 24.

(a) 1 *Drew. & Sm.* 611.

1865.

Dec. 19, 22.

A testator gave his real and personal estate to trustees, in trust to convert and invest, and he directed them to permit his wife to receive, "from his death, the net annual income actually produced by his trust property, howsoever constituted or invested." The testator was in partnership, the accounts of the profits of which were made up in *July* in each year, and he was entitled, at the end of each year, to be credited with interest on his capital. The testator having died in *March*, *Held* that the widow was entitled to the whole profits of the business from the preceding *July*, but that she was only entitled to an apportioned share of the interest on the testator's capital as from his death.

## IBBOTSON v. ELAM.

**I**N *January*, 1860, the testator *William F. Ibbotson* (who died in *March*, 1864), executed partnership articles, whereby he and his mother and brother agreed that the prior partnership should continue in force for five years, even though any of them should die before the expiration of that term. The articles provided, that, "before any division of the profits, each partner should, at the end of each year, be duly credited with interest at the rate of 5 *per cent.* upon the amount of the capital he or she possessed in the business at the beginning of such year." The fifth article provided, that "the profits of the business should be annually divided, in equal proportions, between the partners." It was also agreed, that on the death of any partner before the expiration of the term, the time to be given for the payment of his capital should be decided by arbitration, and that the good-will should belong to the survivors.

During the period of the business being carried on stock was taken, and a statement of account and balance-sheet were made out, in respect of the business of the firm, shewing the interests of the partners respectively therein up to the 1st day of *July* in each year. The last of such stock takings prior to the death of *William F. Ibbotson* was made on the 1st day of *July*, 1863, and a balance-sheet was then drawn out which was approved of by all the partners.

*William F. Ibbotson* died on the 26th day of *March*, 1864, having made his will, dated 1863, whereby he gave

gave his real and personal estate to his executors on the following trusts :—

Upon trust, as soon as conveniently may be after my decease, to sell my real and leasehold estates by public auction or private contract, and to sell, convert and get in my residuary personal estate, and invest the produce conformably to the clause for the investment of monies hereinafter contained. “And I direct that my trustees shall (subject to any advance that may be made to my children pursuant to the clause in that behalf hereinafter contained) permit my wife, she continuing my widow, to receive, from my death, *the net annual income actually produced by my trust property howsoever constituted or invested.*”

The testator directed “that subject to the preceding directions, his trustees should hold his trust property for the use of his children.” And he also directed that all investments of money thereinbefore authorized or directed to be made by his trustees should be made in their names, in the public stocks or funds or in government securities of the United Kingdom, or upon mortgage or real or leasehold estates, or on the bonds, debenture stock or preference stock of any railway, canal or other company in *England* incorporated by act of parliament, &c. And he empowered his trustees, from time to time, to vary such investments, at their discretion, for any other or others of the kinds prescribed.

The testator died, as before stated, in *March*, 1864, and he left his widow and four children.

After his death, the partnership was continued by his surviving partners and his executor on the footing of the articles.

q q 2

Stock

1865.

IBBOTSON  
v.  
ELAM.



1865.

IRBROTON  
v.  
ELAM.

Stock was taken in the business and a general annual statement thereof was made by the surviving partners and the executor, after the death of the testator, at the usual yearly time, that is, up to the end of *June*, 1864, and a final stock taking was made on the 31st of *December*, 1864, up to which time a balance-sheet was prepared, shewing the interests of the surviving partners and of the executor in the capital and profits of the business.

All the accounts between the surviving partners and the executor had been duly adjusted and settled, and from such accounts it appeared, that a large amount was due to the testator's estate for his share of the profits of the business, from the stock taken on the 1st of *July*, 1863, to the stock taking on the 1st of *July*, 1864, and also from the stock taking on the 1st of *July*, 1864, to the 31st of *December*, 1864, and that there was a large amount of interest due to the testator's estate on his capital in the business.

The widow insisted that she was entitled, as income of the testator's residuary estate, to the whole of such profits as had accrued from the 1st of *July*, 1863, to the death of the testator on the 26th of *March*, 1864, and also to such as had accrued from the 26th of *March*, 1864, to the 1st of *July*, 1864, and also to such as had accrued from the last-mentioned day to the 31st of *December*, 1864.

The widow also insisted, that she was entitled to all the interest which had accrued on the capital of the testator in the business during the same periods.

The Defendants, on the contrary, insisted that the whole of the profits of the business due to the estate of the  
testator

testator during the same periods were to be considered as *corpus* of his estate, and that the whole of the interest due on his capital in the business was to be considered as capital, and that the widow was only entitled, as income, to so much as such profits and interest would have produced if invested, on the death of the testator, in the £3 per Cent. Consols.

1865.  
IBBOTSON  
v.  
ELAM.

To determine these questions a case was submitted for the opinion of the Court on the following questions : 1st. Whether the widow Mrs. *Ibbotson* was entitled to receive the whole or any and what part of the profits accrued on account of testator's share from the 1st of *July*, 1863, up to the 26th of *March*, 1864, and from the last-mentioned day up to the 1st of *July*, 1864, and from the last-mentioned day up to the 31st of *December*, 1864, or how the executors ought to apply the same sums when received by them. 2nd. Whether the widow Mrs. *Ibbotson* was entitled to receive the whole or any and what part of the interest accrued due on the share of the testator between the same respective periods, or how the executors of the testator ought to apply the same when received by them.

Mr. *Selwyn* and Mr. *Marten* for the widow. Under the terms of the will, the widow is entitled to "the net annual income produced by the trust property however constituted or invested." This carries the whole profits from the 1st of *July*, 1863, to the 31st of *December*, 1864, and also the interest on the capital from the same period.

There can be no apportionment of the profits of a trade, they can only be ascertained after taking all the accounts,

1865.  
  
 IBBOTSON  
 v.  
 ELAM.

accounts, and after determining how much it is prudent to divide. After the death of the testator, the accounts must be taken and the profits ascertained in the same way and at the same time as had previously been done, namely in *July* in each year. The state of those accounts must constantly vary during the course of each current year; and the actual profits of the year might all have been made subsequent to the death of testator, or before that event. It is, therefore, impossible to ascertain what were the profits either before or after the 26th of *March*, 1864, without taking the whole of the partnership accounts up to that period, which is precluded by the arrangements between the partners. The income from the partnership could only be ascertained in *July*; until that time it did not exist, and the whole therefore belongs to the widow, as in the case of the public funds, where the tenant for life would take the whole half-yearly dividends if the testator died the day before they became due and if the Apportionment Act (4 & 5 *Will.* 4, c. 22) did not apply.

Secondly, as to the interest on the capital, it must be admitted that the general rule is, that interest accrues *de die in diem*; but here the rule is controlled by the terms of the articles. They provide that, before the division of the profits, each partner shall, at the end of each year, be credited with interest; therefore it does not accrue from time to time, but at the end of each year when credit is to be given in the accounts.

They cited *Bates v. Mackinley* (a); *Maclaren v. Stainton* (b); *Howe v. Lord Dartmouth* (c).

Mr.

(a) 31 *Beav.* 280.

(b) 3 *De G., F. & J.* 202.

(c) 7 *Ves.* 137.

Mr. *Hobhouse* and M. T. *Terrell* for the Defendants. The widow is only entitled to the income of the testator's "trust property," and every asset became, at his death, trust property and as if the partnership had been wound up on that day. The testator, in the first place, directs positively that his property shall be converted and invested as soon as conveniently might be after his decease, and this direction governs the subsequent trust in favor of the widow. The testator, in the gift to his widow, is dealing with the converted invested property as his "trust property"; *Howe v. Lord Dartmouth* (a); *Morgan v. Morgan* (b). It is argued that there was no ascertainment of the profits at the death of the testator, and that therefore none existed; but the cases cited related to public companies, and there is a marked distinction between public companies and a private partnership. Some profits must have been made in the lifetime of the testator, and which now form part of the *corpus* of his estate. The difficulty in ascertaining them cannot affect the construction of the will, or alter the rights of the parties; the Court in many cases of difficulty, strikes the average. If it were the case of an individual who had been accustomed to make up his books at fixed periods, and then to ascertain the yearly profits of his business, there could be no doubt that the profits down to the day of his death would constitute *corpus*, and not income; if so, the existence of a partnership cannot alter the construction of the will.

As to the interest, the rule is admitted, and the mere fact of its being credited or paid at the end of the year cannot alter the rule, for such is usually the case. But this and the other point are governed by the decision of Vice-Chancellor Wood in *Johnston v. Moore* (c).

Mr.

(a) 7 Ves. 187.  
(b) 13 Beav. 441.

(c) 27 Law J. (Chanc.) 453.

1865.

IBBOTSON  
v.  
ELAM.

1865.  
  
 IBBOTSON  
 v.  
 ELAM.

Mr. *Selwyn* in reply. The testator must have been cognizant that, by the partnership articles, the capital was to be retained after his death. The case of *Johnston v. Moore*, though adverse to the widow on the question of interest, is in her favor as to the profits.

---

*The MASTER of the ROLLS.*

Dec. 22.



The testator, in this case, was engaged in partnership with his mother and brother, and, by the terms of the partnership articles, the profits were to be ascertained and divided in *July* in each year, and in every event the capital was to remain in the business until *December*, 1864. The testator died on the 26th of *March*, 1864, and the first question is, whether the widow is entitled to all the profits of the business made subsequent to *July*, 1863, or whether something in the nature of an apportionment of the profits is to be made, or the amount of profits down to the death of the testator in some way ascertained.

The second question is, whether the whole interest of the capital of the testator from the last yearly settlement belongs to the widow, or whether a rest is to be made at the death of the testator, and the interest from that time only given to the widow. These questions depend in some measure on the articles and in some measure on the will taken in connexion with them.

The first argument is, that the clause for investment precedes the bequest to the widow; but I am of opinion that cannot be so, because his wife is to receive the net annual income actually produced "from my death," and her right accrues on the moment of his death. That being so, the question arises, whether an apportionment  
 or

or rest can be made on the death of the testator in order to give her those profits only which accrued after the testator's death and down to *July*, 1864. I am of opinion that no such apportionment can be made, and that she is entitled to all the profits made since the 1st of *July* in the last preceding year. In the first place, it is to be observed, that by the partnership articles all the profits are to be ascertained on the 1st of *July*, and the business has been carried on upon that principle and the value of the stock taken at that time. But the value of the stock and the amount of the profits might be materially altered if taken at any other time. The testator died in *March*, and it might occur that various sums due to the concern, and which were then considered good debts, might before *July* turn out bad, or the opposite might happen and supposed bad debts might, in the interval, become good. Again, they might have a large stock in trade, which, from accidental circumstances, either political or domestic, might be seriously depreciated in the value in the interval. But the value was to be fixed in *July*, and if fixed in *March* it might be and would probably be very different from that on the 1st of *July*. If I held the widow entitled to the profits only from the testator's death, I should either decide, that the testator's estate was entitled to some share of the profits in *March*, 1864, which, in one event, might be considerably more than one-third of the profits realized prior to *July*, in which case the testator's estate would be taking more than it was entitled to, or, on the other hand, which might be much less than the actual profits, and the testator's estate would then take less than it was entitled to.

It is obvious that, if the matter is to be determined according to the partnership articles, the profits could  
not

1865.

IBBOTSON  
v.  
ELAM.

1865.

IBBOTSON

v.

ELAM.

not be ascertained until *July*, and, until that time, it cannot be ascertained what profits have accrued.

I think the profits must be treated as at the time when they were ascertained, and that the profits from *July*, 1863, is part of the income to which the widow is entitled under the words of the will.

I have come to an opposite conclusion on the question of interest. The testator's capital was fixed, and the amount ascertained on the 1st of *July*, 1863, and the testator was entitled to interest on that sum at 5 *per cent*. It is obvious that the interest accrued *de die in diem*, and was an ascertained amount: it did not depend on whether the profits were large or small, or on the debts or stock being ascertained. The amount of interest due at his death belongs to his estate, and the widow is only entitled to the interest which accrued subsequent to the death of the testator.

I concur in *Johnston v. Moore* (a) before Vice-Chancellor *Wood*. The case is a little obscure as to the profits, but it appears to me that the decision depended on the instruments themselves.

I must, therefore, declare that the widow is entitled to the whole of the profits from the 1st of *July*, 1863, but only to interest from the death of the testator.

(a) 27 *Law J. (Chanc.)* 453.

---

1865.

BOSTOCK v. FLOYER,

**I**N 1833 a sum of money was placed by Lord *H.* in the hands of Mr. *Wilmot*, in trust for the Plaintiff Mrs. *Bostock*; but no instrument appears to have been executed defining the trusts, or regulating the investment of the money.

The sum of 400*l.*, part of the trust money, was invested by Mr. *Wilmot*, and it was repaid in 1853. Mr. *Wilmot* thereupon employed a Mr. *Conyers*, a solicitor in *Yorkshire* of large practice and high repute, holding the office of coroner and several other high county offices, to procure another investment for the 400*l.*


*Conyers* obtained possession of the 400*l.* and represented that he had laid it out on the mortgage of a copyhold property belonging to one *John Patrick Stephenson*, and he forwarded to Mr. *Wilmot* a parcel of deeds which were found amongst Mr. *Wilmot's* documents after his decease. The statement in the answer of his executor, in regard to this, was as follows:—

Amongst the testator's papers was found a parcel of deeds, wrapped up in brown paper, and containing the following endorsement, that is to say:—"Mortgage of copyhold lands at *Thearne*, in the county of *York*, belonging to Mr. *J. P. Stephenson* for securing 400*l.* and interest, dated 7th *January*, 1853." This endorsement was in the handwriting of *Conyers*. This parcel contained, first, a grant of tithes, dated 10th *December*, 1812, from Sir *James Graham* and others to Mr. *John Stephenson* and his trustees; secondly, a deed of covenant, dated the 23rd day of *August*, 1813, entered into by one

*Nov. 21.*  
A trustee employed a solicitor to invest trust money. The solicitor, who was steward of the manor, sent to the trustee some title deeds and a copy of a surrender of copyholds to secure the trust money, but misapplying the trust money; the pretended surrender had really no existence. *Held*, that the trustee is liable to make good the loss.

*Robert*



1865.  
  
 BOSTOCK  
 v.  
 FLETCHER.

*Robert Ramsey* with one *John Stephenson*, on the occasion of the purchase by *John Stephenson* from *Robert Ramsey* of *Fish Hole Close*, containing five acres, and a close of arable land in *Theurne, North Carr*, containing four acres one rood and sixteen perches (being copyhold of the manor of *Beverley Water Towns*); thirdly, a copy signed by *Conyers*, as steward of the manor of *Beverley Water Towns*, of the admittance on the 20th *May*, 1840, of *John Patrick Stephenson*, as only son and heir-at-law of *John Stephenson*, to the said closes; and fourthly, a copy of surrender, dated 20th *April*, 1853, duly stamped and signed by *Conyers*, as such steward, whereby *John Patrick Stephenson* surrendered to the use of *Richard Coke Wilmot*, his heirs and assigns, the said two closes, subject to a condition for making void the said surrender on payment by *John Patrick Stephenson*, his heirs, executors or administrators unto *Richard Coke Wilmot*, his executors, administrators or assigns of the sum of 400*l.* and interest on the 7th day of *July* next ensuing the date of the said surrender.

Interest was duly paid by *Conyers* to *Wilmot* and by him to the Plaintiff from 1853 down to *Wilmot's* death in 1856, and the interest continued to be paid by *Wilmot's* executors or *Conyers* from 1856 down to *July*, 1863.

In *December*, 1863, *Conyers* died, and in the following year (1864) it was discovered that the alleged mortgage given *J. P. Stephenson* to *Mr. Wilmot* was a mere fiction, that the copy surrender to *Wilmot* had been signed by *Conyers*, the steward of the manor, but that no such surrender ever existed. It further appeared, that the property had been sold by *J. P. Stephenson* to *Conyers* in 1856, and that he had mortgaged it to third parties.

Under these circumstances, *Mrs. Bostock* instituted  
 this

this suit in 1864, to make *Floyer*, the executor of *Wilmot*, liable for the 400*l.* and interest.

1865.

~~~~~  
BOSTOCK
v.
FLOYER.

The Defendant, by his answer, said that *Conyers* was a solicitor in good repute, and, according to his reputation and standing in his own neighbourhood and in every way, fit to be intrusted by *Wilmot* in the laying out of the sum of 400*l.* The Defendant submitted that no vigilance on the part of *Wilmot*, short of his employing a second solicitor to investigate the validity of the security effected by *Conyers* and to check his acts, could have led to the detection of the fraud practised by *Conyers*; that *Wilmot* could not be considered as having been guilty of any breach of duty as trustee, and that the loss (if any), which might result from the fraud of *Conyers*, must fall on the *cestui que trust*.

Mr. *Hobhouse* and Mr. *W. W. Cooper* for the Plaintiff.

Mr. *Haynes* for the Defendant. The question raised by this bill really is, whether a trustee is an insurer of the trust property against every possible loss, and answerable for the fraudulent and criminal acts of every person he necessarily employs in relation to the trust property. Here the loss is like that arising from a *vis major* or by a robbery, and for which, it has always been held, a trustee is not liable; *Jones v. Lewis* (a). A trustee is only bound to take the same care of the trust property as a prudent man would of his own; *Lewin on Trustees* (b). Here the trustee employed, in the ordinary way, a respectable solicitor to invest the money, and he can no more be bound by his fraud than he would in the case of a loss by the insolvency of a banker.

(a) 2 *Ves. sen.* 241.

(b) *Page* 224 (4th edit.)

1865.

 BOSTOCK
 v.
 FLOYER.

banker. A master is liable for the negligence of his servant in the performance of his ordinary duty, but not for his wilful trespass; *M'Manus v. Crickett* (a). A trustee indemnity clause is to be assumed under the statute 22 & 23 Vict. c. 35, s. 31. He also referred to *Ellice v. Roupell* (b).

The MASTER of the ROLLS.

I am of opinion that the liability of this trustee is fixed by the ordinary doctrine of this Court.

Here is a gentleman who accepts the office of trustee and receives 400*l.*, he gives it to his solicitor to invest, the solicitor puts the money into his own pocket and never invests it at all. It is the ordinary case of a trustee who is liable for the default of his solicitor. Mr. *Haynes* thinks that there is some difference, because a surrender of copyholds is forged by a solicitor, who was the steward of the manor, and who writes a regular surrender of copyholds belonging to an existing person and sends it to the trustee as evidence that he had invested the money; but he was acting as solicitor for the trustee and was his agent. There is no receipt for the purchase-money, and, on searching the rolls, it is found that the whole thing is a fiction. *Roupell's* case is distinguishable from the present, for there the forgery was not that of the mortgagee's solicitor. Here a man employs an agent who cheats him; the loss must fall on the trustee and not on the *cestui que trust* who never employed him.

I think the loss must fall on *Wilmot*, who selected this gentleman, and did not take the precaution he might have taken to see whether the mortgage had been made or not.

(a) 1 *East*, 106.

(b) 32 *Beav.* 299, 308, 318.

1866.

KERMODE v. MACDONALD.

THE testatrix, by her will dated in 1832, devised unto her two sisters *Maria Macdonald* and *Sophia Anderson* certain real estate in *Wales*, "subject to the charges and incumbrances thereafter mentioned." She subsequently proceeded as follows:—I give and bequeath to *Mary Ann Judith Griffith* the interest, profits or produce of the sum of three hundred pounds, British, or thereabouts, invested by me in the *General Steam Navigation Company, London*, and also the interest of two hundred pounds, British, for and during her natural life; and upon her decease I will and desire that the said principal sum of five hundred pounds be equally divided amongst the children of *Mary Ann Judith Griffith*.

The testatrix also gave some legacies and annuities, and in a subsequent part of her will, she said:—Also I will and ordain that, in case of my personal estate proving insufficient for the payment of the several annuities and legacies hereinbefore mentioned, that then such deficiency shall be made up from and out of my said real estates in *Wales*, by sale or mortgage, as may be deemed most advantageous to the interests of the parties who may then be entitled to such estates. And she bequeathed all the residue of her personal estate, not thereinbefore given and disposed of, to her two sisters *Sage* and *Ann*, whom she appointed executrixes.

Many years afterwards (1858) the testatrix made a codicil to her will in the following terms:—

"This is a codicil to my last will and testament bearing

Feb. 14, 15, 19.

A testatrix, by her will, bequeathed both general and specific legacies, and she willed that, in case of her personal estate proving insufficient for the payment of her legacies, then the deficiency should be made up out of her real estate. By a codicil, she gave "all my personal estate to *A. C. M.* Held, that *A. C. M.* took the whole personal estate discharged of the legacies; and secondly, that the general legacies still remained charged on the real estate, but that the specific legacies did not, and therefore failed.

1866.

 KERMODE
 v.
 MACDONALD.

ing date the 28th day of *July*, 1832, and I direct that it may be taken as part thereof. I give, devise and bequeath unto *Annie Cosnahan Macdonald* all my personal estate; and I hereby appoint *Annie Cosnahan Macdonald* sole executrix of this codicil to my will."

The testatrix died in 1859.

Two questions arose—first, whether the codicil gave the whole personal estate to *Annie Cosnahan Macdonald*, or gave her merely the residue after payment of the annuities and legacies; secondly, whether, in the event of *Annie Cosnahan Macdonald* being held entitled to the whole personal estate, the annuities and legacies given by the will still remained a charge on the real estates in *Wales*.

Mr. *Baggallay* and Mr. *Aiken*, for the Plaintiff, argued that the legacies and annuities given by the will had not been revoked by the codicil. That the gift in the will being clear, it required equally clear expressions in the codicil to destroy it; *Doe v. Hicks* (a); *Robertson v. Powell* (b); *Cleoburey v. Beckett* (c); and that there were none here. Secondly, that, at all events, the legacies and annuities remained charged on the real estate; *Buckeridge v. Ingram* (d), where, by a will duly attested, an annuity was bequeathed charged upon the real in aid of the personal estate, and by an unattested codicil, which was therefore inoperative as to the real estate, the realty and personalty was given to *A. B.*, and it was held, that the codicil released the personal, but not the real, estate from the annuity.

Mr.

(a) 8 *Bing.* 475.

(b) 33 *Law J. (Exch.)* 34.

(c) 14 *Beav.* 583.

(d) 2 *Ves. jun.* 651.

Mr. *Shebbeare*, for *Annie Cosnahan Macdonald*, argued that by the gift of "all my personal estate," the whole passed unaffected by the legacies and annuities which were revoked. Secondly, that the legacies and annuities, if not revoked, were not charged on the real estate; they being only so charged in case the testatrix's personal estate should prove insufficient for their payment, an event which had not occurred, the personal estate of the testatrix being amply sufficient for that purpose, though otherwise disposed of.

1866.
KERMODE
v.
MACDONALD.

Mr. *Jessel* and Mr. *Bevir*, for the persons entitled to the real estate, argued that the legacies were revoked; that the primary fund having been taken away, the secondary charge, which arose only upon a deficiency of personalty, failed also. They cited *Brudenell v. Boughton* (a); *Sheddon v. Goodrich* (b).

Mr. *Atken*, in reply, referred to *Ashburner v. Macquire* (c); *Le Grice v. Finch* (d).

The MASTER of the ROLLS.

I am of opinion that the effect of the codicil is to pass the whole of the testatrix's personal estate. When she says I give "all my personal estate," I cannot say that that is less. If so, it means "all my personal estate whatsoever and wheresoever."

Feb. 19.

Having come to that conclusion upon the codicil, I refer to the will to see what is the effect of that codicil upon the will. In the first place, I think that the gift of 300*l.* British invested by her in the *General Steam Navigation*

(a) 2 *Atk.* 268.

(b) 8 *Ves.* 481.

(c) 2 *Bro. C. C.* 108.

(d) 3 *Mer.* 50.

Now
the
will
is
construed

Navigation Company is a specific gift, and that it means the 300*l.* of the shares which she had in the *General Steam Navigation Company*. It is not a legacy of 300*l.* to be paid out of a particular fund, which would make it a demonstrative legacy, but it is the 300*l.* which has been invested in that concern: and therefore though I have in evidence as to what shares she had in the *General Steam Navigation Company*, yet I am of opinion that this was a specific legacy of those shares, assuming them to be somewhat about 300*l.* But I am of opinion that the codicil has disposed of those shares by the gift of all the testatrix's personal estate, which carries the subject of that specific gift, and consequently it is altered or revoked by the inconsistency of the subsequent disposition.

But the other bequest of 300*l.* British is a general legacy, and that raises a question of much greater difficulty. I have already stated, that the codicil gives the whole of the personal estate: but then there is a direction that if that of the personal estate proving insufficient for the payment of the several annuities and legacies such deficiency is to be made up out of her real estate in Wales by sale or mortgage. The rule in cases of this description is this:—you are to disturb the original will as little as possible; and here it is to be observed, that the codicil not only republishes the will, but expressly refers to it as being her “last will and testament.” I find it therefore extremely difficult to say that the legatee takes no interest at all. It was argued that the personal fund, out of which the legacy was to be paid, being taken away, the legacy itself failed. I adopt that argument where the legacy is specific, because unquestionably, if a testatrix gives 300*l.* to be paid out of her *Steam Navigation Company's* shares, or gives her shares in the *Steam Navigation Company*, to A., and afterwards

afterwards by codicil gives those very shares to another person directly, or by general words which include them, then the legacy is revoked; and the fact of charging legacies on the real estate cannot apply to a specific legacy or revive a legacy which no longer exists. A gift of plate or anything specific is revoked by reason of the specific chattel being given to another person; but this does not apply to a pecuniary legacy. Here is a legacy of a sum of 200*l.*, which the testatrix says, in case her personal estate be insufficient, shall be paid out of her real estate. What do the devisees of the real estate take? They take the real estate subject to the charges and incumbrances after mentioned, that is, subject to such a charge of so much as may be necessary for the payment of this legacy, the personal estate being insufficient. Suppose the personal estate had become insufficient by an act of the testatrix herself in her lifetime, would that have made any difference? Or suppose the whole of her personal estate consisted of certain specific personal chattels, and that she had disposed of all of them by her codicil, would that have destroyed this legacy? I am of opinion that it would not; nor does the fact of her disposing of the whole of her personal estate do more; it makes it quite clear that the personal estate is insufficient to pay the legacy, and then I think that the trust affecting the real estate in favor of the legatee remains. Suppose the testatrix had said, I give 200*l.* to be paid out of my £3 per Cent. Consols, and in case the £3 per Cent. Consols shall be deficient, I direct it to be paid out of my bank stock, and that she afterwards sold out all the Consols in her lifetime, would that prevent it being charged on her bank stock? I apprehend not. So also if she leaves real estate, and says if the personal estate is not sufficient to pay a legacy,

1866.


KERMODE
v.
MACDONALD.

1866.

KERMODE
v.
MACDONALD.

then it is to be paid out of the real estate. I see no distinction between those two classes of cases. Supposing she had said, I desire the 200*l.* to be paid out of my Consols, and if the Consols are insufficient for that purpose, then I desire it to be a charge on my "Welsh estate:" then if she sold out the whole of the Consols during her lifetime, or gave the whole of them by a codicil to *A. B.*, does that destroy the legacy she has given? She has increased the charge on the other fund; but that, in my opinion, is the whole of what she has done.

I am prepared, therefore, to make a declaration that the effect of the codicil is, to give the whole of the personal estate; that with respect to all specific legacies, they are all revoked by the inconsistent disposition of the property in the codicil; but that, with respect to the pecuniary legacies, they are all charged upon the real estate, and must be paid out of it, the personal estate having proved insufficient.

1866.

BRANFORD v. HOWARD.

IN 1860 the Plaintiff became a member of the *Knottingley Equitable Marine Assurance Society*, which was established for mutually insuring the members of the society from losses happening to their vessels. This society had been established in 1846, under certain rules, the 57th and 63rd of which were as follows:—That in every case in which any notice, by these presents is directed to be given or sent to the members, or any of them, the same shall be given by letter, and that the same shall be either left at the member's place of abode or forwarded through the post-office, and shall be considered to have been given on the day it "was left at his usual place of residence or committed to the post-office, although the same may not actually reach or be received by the said party. And all notices or letters addressed by the members to the president, vice-president, treasurer or secretary relating to the affairs of this society shall be considered as addressed to the directors, unless the subject-matter therein contained shall lead to a contrary conclusion."

The 63rd was as follows:—That "when the owner or owners of any vessel assured by this society shall have occasion to change the captain, he or they shall submit the name of the person, so appointed or about to be appointed to the command of the said vessel, to the directors for their approbation; and in the event of the owners' neglect or refusal so to do, or if the newly-appointed captain shall not be approved by the directors, then, in either of these cases, the society shall not, after the

Jan. 26, 27.

By a rule of a mutual assurance society, the insured was bound to give notice to the directors of any change of the captain of his vessel, and, in case of default, the society was not to be liable for any subsequent loss. By another rule, notices to members sent by post were to be effectual, though not actually received. *Held*, that the directors of the society were members within the latter rule, and that a notice of a change of captain sent to them by post was valid, though not actually received by them.

1866.
BRANFORD
v.
HOWARD.

the first two calendar months from the date of such appointment, be liable to contribute to or make good any loss or damage which the said vessel may sustain during the further time the said captain shall continue to command the said vessel."

The Plaintiff insured his vessel called the *Concord* in the society for 711.

This vessel was lost in *February*, 1864, and the Plaintiff thereupon claimed to be paid the amount of his insurance out of the funds of the society; but this claim being resisted by the officers of the society, the Plaintiff instituted this suit against the president and other officers of the society, to recover payment. The principal defence set up was, that in *September*, 1863, the Plaintiff had changed the captain of his vessel, who had continued to command her down to the time when she was wrecked; but that the name of the new captain had not been submitted by the Plaintiff or any one on his behalf to the directors for their approval, and that the directors had not approved of his appointment. That the change had not been in any way notified by the Plaintiff to them or to the society, and that, until after the "*Concord*" was wrecked, neither the society nor the directors knew of that change.

The Plaintiff however proved, that in *September*, 1863, notice of the appointment of the new captain had been notified to the directors by a letter written by the Plaintiff's wife (he being able to write but imperfectly), on his behalf, addressed to the secretary of the society at *Knottingley*, which letter had been committed to the post-office at *Wells*, where the Plaintiff resided, by the Plaintiff's wife. The Court, however, considered, that it had been proved that this letter had not been received.

The

The Plaintiff also proved, that on the 6th *April*, 1864, the secretary applied to him for payment of a call of 4*l.* 5*s.* 6*d.*, for losses on other vessels insured in the club. This application stated, that unless the amount claimed was paid within two months, the society would not be liable for any loss which the Plaintiff's vessels might sustain.

1866.

 BRANFORD
 v.
 HOWARD.

Mr. *Batten* for the Plaintiff.

Mr. *Williams* for the Defendants.

The MASTER of the ROLLS.

I am of opinion that it is proved that notice was sent of the change of the captain, but that it is also proved that the letter was not received. The question is, whether this was a compliance with the rules of the society.

Jan. 27.

The meaning of the 63rd rule is, that it is incumbent on the person who has insured a vessel to give notice to the directors when he changes the captain, and that if he fail to do so, the society is, for two months only, to be liable for any subsequent loss of the vessel. It is not incumbent on the directors to take any steps or to say that they have received information of the change; but if they disapprove of the person appointed captain they must give notice of their disapproval to the owner of the vessel. I am of opinion that the letter was written to the secretary, and the question is, if that is a sufficient notice to the directors, for I am of opinion that the 63rd rule means that the owner shall give notice, and submit, either in writing or otherwise, the name of the person appointed to command his vessel. The 57th rule

1866.
BRANFORD
v.
HOWARD.

rule provides, that in every case in which notice is directed by the rules to be given or sent to the members or any of them, it is to be done in a particular mode, and I think this case comes within those words. The 63rd rule requires the owner to submit the name of the person appointed captain to the directors for their approbation, and I am of opinion that they are members of the society within the meaning of the 57th rule, and that when a captain is changed, the information which is to be conveyed of the change is a notice to be given to one or more of the members of the society, and that a letter sent to his "usual place of residence" is to be fully effective for all purposes for which such notice is required to be given, if it is so sent. This rule also provides, that the notice shall be complete, although the same may not actually reach or be received by the said party, and that notice to the officers shall be considered as addressed to the directors. This proves that the rule applies to the president as well as to the other members. It also provides, that all notices to the president, treasurer or secretary shall be considered as addressed to the directors.

I cannot control the words of the 57th clause ; they apply to all notices to be given to the members, or any of them, whether they be given to the vice-president, treasurer or secretary or other member of the society. I am, therefore, of opinion, that it is established that, under the 57th rule of the society, notice was given to the directors, through the secretary, of the change of the captain.

The other point is, that after the notice in *September*, 1863 and after the claim had been made for compensation for the loss of the vessel, the directors, in *April*, 1864, called upon the Plaintiff to contribute for the loss
of

of other ships, to which he was liable to contribute as one of the co-insurers of the company. I cannot make out whether the Plaintiff had any other vessel insured in the society, but if he had not, it was clearly a waiver on the part of the directors of any default committed by the Plaintiff.

1866.
BRANFORD
v.
HOWARD.

I must make a decree for the Plaintiff with costs.

MACKENZIE v. BRADBURY.

1865.
June 15.

THE testatrix, by will dated the 2nd *February*, 1859, gave a legacy of 1,000*l.* to *John Henry Mackenzie*, "in trust for such of the children or child of my niece, *Mary Bradbury*, who shall attain the age of twenty-one years, and the children of any or either of her children who shall have died under that age."

By her will the testatrix gave 1,000*l.* amongst the children of her niece. By a codicil, she recited that she had, by her will, given 1,000*l.* to *F. B.* (a son of her niece), and she declared that the said legacy should not be payable until twenty-one, with power of maintenance. *Held*, that the erroneous recital constituted no gift, and that *F. B.* was only entitled to a share of the 1,000*l.*

The will contained a power of maintenance and a power of advancement not exceeding half of a child's expectant or presumptive or vested share.

On the 1st of *March*, 1860, the testatrix made a codicil to her will in these terms:—"Whereas, by my will or a codicil thereto, I have bequeathed to *Francis*, the son of my late husband's niece, *Mary Bradbury*, the sum of 1,000*l.* payable as therein mentioned: Now I hereby declare that the said legacy shall not be payable until the said *Francis Bradbury* shall attain the age of twenty-one years, but with power to the trustees or executors of my will to pay or apply the interest or income thereof in or towards his maintenance or education, in such manner as they shall, in their discretion, think best."

The

1865.

The testatrix died in *June*, 1861.

MACKENZIE
v.
BRADBURY.

At the date of the will (*February*, 1859) *Francis G. Bradbury* was the only child of *Mary Bradbury*; but before the date of the codicil (*March*, 1860) another child was born, who died in *April*, 1860, and two children were born after the testatrix's death.

Francis G. Bradbury claimed, under the codicil, to be entitled, by implication, to an absolute legacy of 1,000*l.* in addition to his share in the 1,000*l.* given by the will.

Mr. *W. P. Dickins* for the Plaintiff the trustee.

Mr. *Selwyn* and Mr. *Kekewich* for *Francis Bradbury*. The recital that the testator had by his will or codicil bequeathed 1,000*l.* to *Francis* amounts to a gift; "for if a testator unequivocally refer to a disposition as made in that his will, which in fact he has not made, the intention to make such a disposition, at all events, will be considered as sufficiently indicated;" *Jarman on Wills* (a). In *Adams v. Adams* (b), Sir *James Wigram* says, "Where a testator, in one part of his will, has recited that he has given a legacy to a certain person, but it has not appeared that any such legacy was given, the Court has taken the recital as conclusive evidence of an intention to give by the will, and fastening upon it, has given to the erroneous recital the effect of an actual gift."

In addition the testatrix has directed this 1,000*l.* to be paid; this of itself constitutes a gift of it.

Mr. *Southgate* and Mr. *Rodwell* for the residuary legatees.

(a) 1st ed. ch. xvii.

(b) 1 *Hare*, 540.

legatees. This is simply a mistake of the testatrix to which effect cannot be given. The rule as laid down in *Re Arnold's Estate* (a) is this: "if the testator, in the codicil, recites that by his will he has made a devise or bequest which does not there appear, then the codicil does not, by such recital, create that bequest or devise." This case differs from those referred to by the other side, where the recital was of something in the same instrument. The rule is clearly pointed out by Sir William Grant in *Smith v. Fitzgerald* (b). He says, "If, in the preceding part, there was nothing that could in any way answer the description of what he here says he had willed to them, there would then be room for the application of the doctrine, that a declaration by a testator that he had given something is sufficient evidence of an intention to give it, and amounts to a gift; but the question here is, whether he did not mean to describe, however inaccurately, that which he had before actually given." He afterwards adds, "Without denying that the recital of a gift as antecedently made may amount to a gift, the Court ought to see, very clearly, that there is nothing in the will to which the recital can refer, before it is turned into a distinct bequest; otherwise an inaccurate testator may be held to make a second bequest when he has only made an incorrect reference to the first."

Here there is something to answer the legacy described, but it is described inaccurately, and the description constitutes no gift.

Mr. Wickens for the other children of *Mary Bradbury*.

Mr. Selwyn in reply.

The

(a) 33 *Beav.* 171.

(b) 3 *Ves. & B.* 8.

1865.

 MACKENZIE
 v.
 BRADBURY.

1862
 MASTER OF THE ROLLS
 1862

THE MASTER OF THE ROLLS.

I am quite clear, upon general principles, that an erroneous recital by a testator in a codicil that he has, by his will, given a legacy to A. B., when he has not done so, creates no legacy at all. There are some dicta in the earlier cases which look like it, and it is discussed in *Donner v. Pyram* (a); but in that case Lord Eldon decided that a more erroneous recital that there was a gift in a prior will created no gift, and I know of no case which reverses that case. I am satisfied that *Stannard v. Stannard* (b) did not do so, and that it was the intention of Vice-Chancellor Wigram, who decided that case, to adhere strictly to the rule. Nothing is more dangerous than to create gifts by implication or by an erroneous recital.

The next question is, whether the words in this codicil amount to a gift. I am disposed to think the claimant's case would be very favorable, if no will had been found, because then it might be that the words in the codicil amounted to a direction to pay the 1,000*l*. It looks very much like another mode of saying, the 1,000*l*. shall be paid at twenty-one. If the codicil alone had been found and the will had not been forthcoming, I am disposed to think it would amount to a gift.

But here the will is in existence, and you find in it the bequest of a legacy of 1,000*l*., in which *Francis* takes an interest as one of the children of the niece; and I am of opinion, that the testatrix merely intended to refer to the legacy previously given by her will, the recital of which was erroneous, and that the testatrix only directs that the trustees shall have a power to maintain

(a) 18 *Ves.* 27.

(b) 1 *Hare*, 537.

maintain and educate *Francis Bradbury* during his minority, and that she did not intend to make a new gift. When you look at the will, you find that a share in the 1,000*l.* is the only legacy she intended to give. I must declare that *Francis* is only interested in one legacy of 1,000*l.* as one of the children of *Mary Bradbury*, and which is payable at twenty-one, with power for his maintenance and education.

1865.
MACKENZIE
v.
BRADBURY.

GEE v. LIDDELL. (No. 1.)

1866.
Jan. 23, 26.

THE testator *Stephen Gee* directed his executor to stand possessed of the sum of 2,000*l.*, upon trust either to retain the same in his own hands at interest at 4*l. per cent.*, or to invest it, and to pay the interest to his daughter *Mary Whitaker* for her separate use for life, with remainder to her children; and he appointed his son *Joseph Gee* his sole executor.

Distinction between enforcing the performance of a complete voluntary trust and enforcing the completion of an incomplete one.

The testator died on the 5th of *January*, 1841, and *Joseph Gee* his son, who was also his executor and residuary legatee, being satisfied that the testator intended to bequeath 3,000*l.*, and not 2,000*l.*, to his daughter and her children, acted upon that footing and signed certain documents which will be presently stated. He (*Joseph Gee*) died in 1860, and the question was, whether *Thomas Whitaker*, the only child of *Mary Whitaker* deceased, was entitled to be paid this extra 1,000*l.* out of *Joseph Gee's* assets.

A testator bequeathed 2,000*l.* on certain trusts, and he empowered his executor, who was also his residuary legatee, to retain the amount in his hands uninvested, he paying interest thereon. After the testator's death, the executor, being satisfied that the testator intended to be-

From

queath 3,000*l.*, and not 2,000*l.*, promised to make it up 3,000*l.*; he made no investment, but continued to pay interest on the 3,000*l.* to his death. *Held*, that there was a complete voluntary trust as to the additional 1,000*l.*, which this Court would enforce.

A debt held not satisfied *pro tanto* by a legacy of a less amount bequeathed by the debtor to the creditor.

From the evidence it appeared that the day after *Stephen Gee's* death, his son *Joseph* stated to a witness, "W." that he and Mr. and Mrs. *Whitaker* "have been reading my father's will. My father told me *Whitaker* was to have £1,000 more than is mentioned in the will: but I have told *Whitaker* it shall make no difference, and I will make sure he shall have 1,000 more than he is entitled to by the will."

The following memorandum was also signed by *Joseph Gee* and *Thomas Whitaker*, the husband of *Mrs. Whitaker* —

"I will, in the name *Stephen Gee*, Esq., the said *Joseph Gee* pays to the said *Thomas Whitaker* the annual sum of £300 at two equal payments, viz. the 1st July and 1st January in each year, being interest at 4 per cent on £1,000.

"*Jos. Gee.*

"*Thos. Whitaker.*"

Another document in the handwriting of *Joseph Gee* was also proved —

"My father having said to me that he had left my share of his will three thousand pounds, and being quite mistaken that he had the impression that there was £3,000 named in the will, whereas there are only 2,000, I immediately told Mr. *Whitaker* I should make it up £3,000 being quite clear of my father's intention.

"*Jos. Gee.*"

This was dated the 15th of January, 1841.

Two other documents were proved, which were signed by *Thomas Whitaker*. The first was as follows:—

"I, *Jos. Gee.*

"This morning *Joseph Gee* handed me his father's will

will and desired me to break the seal and read it, which I declined to do. He then opened and read it himself, and putting it to me said there was a mistake in it, as although the will stated the interest of 2,000*l.* was to be paid, his father had said (a week previous to his death) it was the interest of 3,000*l.*, which, upon *Joseph* again asking him, he repeated 3,000*l.* In consequence of which the interest on the latter sum is to be paid to his sister at the rate of 4*l. per cent.*—in the presence of *Mary Whitaker* and *John Duncan*.

“Also that the said *Joseph Gee* was to pay to *Thomas Stephen Whitaker*, grandson of the said *Stephen Gee*, the sum of 1,000*l.* on his attaining the age of twenty-one years.

“I put this into writing, in case of any of the parties dying or otherwise forgetting the occurrence, in order that my dear *Tom* may have his rights.”

“*Thomas Whitaker.*”

The second document, which was also signed by *Thomas Whitaker*, was as follows:—

“*Hull, Dec. 9, 1846.*

“I give all my property to my son the said *Thomas Stephen Whitaker*. 3,000*l.* is due to him under his grandfather’s will, although it names only 2,000*l.*, and another thousand (when he is of age) from his uncle *Joseph Gee* according to the last wishes of his grandfather,” &c., &c.

“*Thomas Whitaker.*”

It appeared also that on the 30th of *April, 1852*, the testator *Joseph Gee* had paid *Thomas Stephen Whitaker* 1,000*l.*, and for which he gave the following receipt:—

“Memorandum.—That I have this day received from my uncle *Joseph Gee* the sum of 1,000*l.*, which my
late

1866.

—
GEE
v.
LIDDELL.
(No. 1.)

1866.

GEE

v.

LIDDELL.
(No. 1.)

late grandfather *Stephen Gee* desired to be paid to me on my attaining twenty-one years of age."

"April 30th, 1852."

"*Thomas S. Whitaker.*"

Joseph Gee, the son, by a codicil to his will dated in 1859, bequeathed to *Thomas S. Whitaker* the sum of 2,000*l.*, to be paid to him within twelve months after his decease. *Joseph Gee* died in 1860.

Sir *R. Palmer* (Attorney-General) and Mr. *Waller* for the claimant *Thomas S. Whitaker*. The executor and residuary legatee of *Stephen* assented to and retained the legacy of 3,000*l.*, and acknowledged his obligation to pay it by writing; he acted on it, during his life, by paying the interest, and became a trustee for the Plaintiff; *Ex parte Pye* (a); *Bentley v. Mackay* (b). His assets, therefore, are to make it good. It is like a promise made to the testator, which the Court would enforce; *Podmore v. Gunning* (c); *Stickland v. Aldrich* (d).

Mr. *Baggallay*, Mr. *Archibald Smith* and Mr. *Jackson*, for the Plaintiffs, argued that the second testator was under no legal obligation to pay the 1,000*l.*, and had created no trust; *Dipple v. Corles* (e). Secondly, that the extra 1,000*l.* had been discharged by the payment to *Thomas Whitaker* of that sum in 1852. Thirdly, that the debt, being thus reduced to 2,000*l.*, was satisfied by the legacy of that amount bequeathed to *Thomas Whitaker* by the will of his uncle *Joseph*.

Mr. *Selwyn*, Mr. *Randall* and Mr. *Hobhouse* for other parties.

Sir *R. Palmer* in reply.

The

(a) 18 *Ves.* 140.

(b) 15 *Beav.* 12.

(c) 5 *Sim.* 485.

(d) 9 *Ves.* 516.

(e) 11 *Harc.* 183.

The MASTER of the ROLLS.

Notwithstanding a great deal of ingenious argument on the subject, I am in favor of Mr. *Whitaker's* claim. The argument is, that the sum of 3,000*l.* spoken of in the memoranda was meant to be merely the 2,000*l.* mentioned in *Stephen's* will, and an additional 1,000*l.* to be given to *Thomas Whitaker* the son, and that this was reduced to 2,000*l.* by the payment to him of 1,000*l.* in 1852, then by the doctrine of satisfaction that this sum of 2,000*l.* has been satisfied by the legacy given by *Joseph Gee* to *Thomas Whitaker*, so that instead of getting the 3,000*l.* he is to receive nothing at all in respect of it.

I think, however, that this argument is not consistent with the evidence before me. In the first place *Stephen Gee* by his will gave 2,000*l.* to his daughter for her life, and after her death to her children living at her death, to be equally divided, and to be paid to them on attaining twenty-one. That being the case, then this event takes place:—*Stephen* dies on the 5th of *January*, 1841; and on the 18th of *January* *Joseph* his son writes this paper:—"My father having said to me that he had left my sister by will 3,000*l.*, and being quite satisfied that he had the impression that there was 3,000*l.* named in the will, whereas there are only 2,000*l.*, I immediately told Mr. *Whitaker* I should make it up 3,000*l.*, being quite clear of my father's intention." Now is it possible to say that is more than to change the 2,000*l.* into 3,000*l.*? He does not say it was to be 3,000*l.* during my sister's lifetime, and then nothing more, but he expressly says that it was to be "made up to 3,000*l.*," that is, that the 2,000*l.* was to be changed into 3,000*l.* It is impossible, I think, to get over those words. Then it is argued that this is consistent with the payment of

1866.

GEE

v.

LIDDELL.

(No. 1.)

Jan. 26.

1866.

GEE
v.
LIDDELL.
(No. 1.)

the 1,000*l.* to the son as part of this 3,000*l.* But it is to be observed that that is altering the words of the documents. Upon the son attaining twenty-one, *Joseph Gee* his uncle pays him 1,000*l.* and takes a receipt from him for it, as being a sum of 1,000*l.* which his grandfather *Stephen Gee* had desired to be paid to him on attaining twenty-one. Besides this, *Thomas Whitaker*, who is dead, had written two documents, and in one of them he expressly states that his son *Thomas Stephen Whitaker* was to have the 3,000*l.* under his grandfather's will, although it names only 2,000*l.*, "and another 1,000*l.* when he is of age." Now undoubtedly that document would not be evidence in favor of *Thomas Whitaker* himself; but he is dead, and it is quite consistent with another statement he has made; and as one of these documents has been made use of against *Thomas Stephen Whitaker*, I think that, subject to the due weight to be attached to these documents, and subject also to the observation that it is a person giving evidence in favor of himself or his own family, they are all admissible upon this question. The third document is quite consistent with that which is signed both by *Joseph Gee* and *Thomas Whitaker*. The only mode in which I can explain these documents is, that two sums were to be paid, one of 3,000*l.*, the other of 1,000*l.* This I hold to be quite clear, that if I change the word *two* into *three* in *Stephen's* will, so as to give 3,000*l.* to his daughter for life, with remainder to her children, it can in no degree be satisfied by a payment of 1,000*l.* to *Thomas Whitaker* on his attaining twenty-one, the more especially as it is expressly stated on the receipt that it is "the sum of 1,000*l.* which my late grandfather desired to be paid to me on my attaining twenty-one years of age;" while the other 3,000*l.* was to be paid, not to one, but among all the children on their

their attaining twenty-one, and after the death of their mother. In my opinion, therefore, the 3,000*l.* and the 1,000*l.* are two separate and distinct sums.

1866.

 GEE
 v.
 LIDDELL.
 (No. 1.)

I will presently consider the question whether there is a debt from the estate of *Joseph* in respect of the 3,000*l.*; but assuming that to be the case, then I am of opinion that it cannot be satisfied by a legacy of 2,000*l.* According to the cases, a debt is not satisfied by a legacy of a smaller amount, but they are separate and distinct things, and if a person, who owes 3,000*l.* to *A.*, leaves him a legacy of 2,000*l.*, *A.* takes both, and the legacy is not a satisfaction *pro tanto*. Therefore it is, that, by a very singular process, it is attempted to cut this 3,000*l.* down to 2,000*l.*, in order to bring it within the rule that the legacy of 2,000*l.* given to *Thomas Whitaker* by *Joseph Gee*, would be a satisfaction of the debt of the same amount. The doctrine itself of satisfaction of a debt by a legacy, is not a very satisfactory one; because it is clear, that in the great majority of cases, a testator never thinks that he is satisfying a debt when he is making a gift by his will. In addition to this, I do not think that the doctrine of satisfaction would apply to a case where a sum being held by *A. B.* upon certain trusts, he by his will bequeathed a legacy to one of the *cestuis que trust*.

I then come to the question whether there is really a debt which *Thomas Whitaker* could enforce. I am of opinion that this case comes within the rule of those cases in which a man declares himself to be a trustee of a sum of money, where this Court interferes, not to complete the trust, but to execute it. The distinction between the cases is, that where a trust, though voluntary, is complete, the *cestui que trust*, although he cannot call on the Court to complete a

1877.
 ~~~~~  
 Case  
 1.  
 Trusts  
 No. 1.

that may call in the Court to execute one that is completed. I have therefore only to consider whether, in this case, the relation of trustee and *cestui que trust* exists. In the first place, *Stephen Gee*, by his will, leaves £2,000L of which the interest is to be paid to his daughter for her life, and after her death to her children equally. The testator also says to his only son and executor, "You may invest this or not, as you please, but if you retain it you must pay interest for it at 4 per cent." Could *Joseph Gee*, after proving his father's will and taking possession of his assets, amply sufficient for the payment of the legacy, say that he was not a trustee of that 2,000L? That would be impossible. The trust is expressly declared by the will. He is told that he need not invest it, but may retain it in his own hands as trustee. I am of opinion that the relation of trustee and *cestui que trust* was completed, and the son was strictly and properly a trustee of that sum of money, although it had not been separated from the estate; because the will of the testator allowed the executor to retain the 2,000L in his hands at interest, and to constitute himself a trustee of that sum without separating it from the mass of the property.

Then what takes place is this:—Upon the death of *Stephen*, the testator, his son *Joseph* says, in substance, "My father told me that he intended to bequeath the sum of 3,000L. and not of 2,000L., and he firmly believed that he had put 3,000L. in the will, whereas it was only 2,000L.; he told me so a week previous to his death; and that being so, I intend to follow his directions." Thereupon he signs this statement. How can I distinguish the 3,000L. from the 2,000L.? Is he not in the same relation with respect to the 3,000L. as he would have been with regard to the 2,000L. If he had invested 2,000L. only, and not 3,000L., something might

might have been said; but suppose he had invested the 3,000*l.*, would it not be clear that there was a declaration of trust in respect of that 3,000*l.*, though invested in his own name alone? This paper is a distinct and clear declaration of trust in writing of that 3,000*l.*, and according to the permission contained in his father's will, he, instead of investing it, holds it in his own hands, and the whole fund stands in the same situation. I am therefore of opinion that the trust is complete, and that this Court will enforce the execution of it in favor of *Thomas Whitaker* the son.

1866.  
GEE  
v.  
LIDDELL.  
(No. 1.)

GEE v. LIDDELL. (No. 2.)

THE testator *Joseph Gee*, in addition to other benefits gave to his nephew *Thomas S. Whitaker* a legacy of 2,000*l.*, to be paid to him within twelve months after his (the testator's) death.

The testator died in 1860, and amongst his papers the following note of hand was found:—

"1,000*l.*

" *Hull*, 3rd May, 1852.

" On demand I promise to pay to *Joseph Gee*, Esq., the sum of 1,000*l.*, value received by my late father."

" *Thomas S. Whitaker*."

No interest had ever been paid by *Thomas S. Whitaker*, and it further appeared that the testator, who held in his hand another legacy of 2,000*l.* to which *Thomas S. Whitaker* was entitled, had regularly paid the whole of the interest on that sum to him, without making any deduction in respect of the promissory note.

Under these circumstances *Thomas S. Whitaker* insisted

Jan. 23, 26.

The testator held 2,000*l.* belonging to his nephew, on which for eight years he paid interest, notwithstanding the nephew owed him 1,000*l.* on his promissory note. Though the nephew had paid no interest on the note, and had given no acknowledgment of the debt:—Held, that, although the remedy for recovering the 1,000*l.* was barred by the Statute of Limitations, still the right of the executors to set it off against the 2,000*l.* remained.

1866.

GEE

v.

LIDDELL.  
(No. 2.)

sisted that the note was barred by the Statute of Limitations.

Sir *R. Palmer* (Attorney-General) and Mr. *Waller*, for *Thomas S. Whitaker*, argued that the debt was due from *Thomas S. Whitaker's* father, and the note given for it was barred by the statute. Secondly, that the testator never intended to treat it as a debt, and had abandoned his claim on it; *Flower v. Marten* (a).

Mr. *Baggallay*, Mr. *A. Smith* and Mr. *Jackson*, *contra*, argued that the statute only barred the remedy, and not the debt, and that the executors were entitled to exercise their right of set-off, though they could not maintain an action upon the promissory note.

They cited *Courtenay v. Williams* (b); *Coates v. Coates* (c).

---

*The MASTER of the ROLLS.*

Jan. 26.

With respect to the promissory note of 1,000*l.* given by *Thomas Whitaker*, I cannot, in my opinion, treat the acts of *Joseph Gee* as being a release of that sum of money. If I were asked, whether I thought it probable that he intended ever to enforce payment of the note, I should answer in the negative. I do not believe he ever did, and the non-payment of interest is the strongest evidence in that direction. In addition to which the relationship of the parties also points to that conclusion. But supposing the six years had not elapsed, could it be possible to say that the executors could not enforce payment of this note, or that they ought not to enforce

(a) 2 *Myl. & Craig*, 459.*Law J. (Chanc.)* 204.(b) 3 *Hare*, 539, *affirmed* 15(c) 33 *Beav.* 249.

enforce it? The testator had a right to enforce it at law, and if he had intended not to do so, he might have destroyed the note, instead of which he allowed it to remain in existence. The Statute of Limitations does not bar a debt; it only bars the remedy for recovering it. The consequence is, that the arguments, which only acquire a little accumulative force by the fact of eight years instead of six having elapsed, are not, in my opinion, sufficient to show that there was any release of the debt. The testator, if he intended his nephew to be absolutely released from the debt, ought to have done some act for that purpose; but there is a perfect blank on the subject, and nothing more than this:—that he never enforced payment of the interest, and during the whole of the time paid a much larger sum than was necessary to the nephew for interest on the 2,000*l*. I cannot hold that to be a release of the debt, and I think that the executors are bound, on the part of the residuary legatee, to set off the amount of the promissory note against anything due to *Thomas S. Whitaker*.

1866.

GEE  
v.  
LIDDELL.  
(No. 2.)

## GEE v. LIDDELL. (No. 3.)

THE testator, a shipowner and merchant, gave his real and personal estate to trustees, upon trust, as to his real estate, for his wife for life, and as to his personal estate upon trust to convert it into money with all convenient speed. And subject thereto and to certain limitations thereof, which failed, he directed his trustees to stand seised and possessed of his real estate and the moneys to arise from the sale of his personal estate, and of the annual rents, produce and profits thereof, on trust to pay "the whole of the annual rents, profits and produce" of his real estates, and of the moneys to arise from

Jun. 23, 26.

A sole trader, by his will, gave "the annual or other earnings, proceeds and profits to arise from his business," to one for life, with remainders over. *Held*, that, in ascertaining these proceeds and profits, interest on his capital in his business was not to be first deducted.

1866.  
GEE  
v.  
LIDDELL.  
(No. 3.)

from the sale of his personal estate, to his nephew *Thomas S. Whitaker* for life, with divers remainders over.

And he empowered his trustees to postpone the sale of his steam ships, and, until their sale, to employ the same, and, for that purpose, to apply any part of his personal estate as should be necessary. And he declared that "*the annual or other earnings, proceeds and profits to arise from the said business*, and employment and navigation of the steam or sailing ships or vessels, should be held, paid and applied" by his trustees, upon and to "the same trusts, intents and purposes as were thereinbefore declared" concerning the moneys to arise from his personal estate.

The testator died in *October*, 1860, and the trustees carried on his business until *March*, 1863, when the steam ships were sold with the goodwill of the business for 30,400*l.* The net profits during that period amounted to 8,161*l.* The capital embarked by the testator at his death, exclusive of the ships, amounted to 25,590*l.*; but which had been reduced to 9,735*l.* when the ships were sold.

The question was, what part of the profits of this business was payable to the tenant for life under the terms of the will.

It was argued, either that the 8,161*l.* or the income of it as produced *de anno in annum* belonged to the tenant for life. Secondly, that interest on the capital employed in the testator's business ought to be deducted from the 8,161*l.* before the net profits could be ascertained, and that such interest belonged to the tenant for life as income.

Sir *R. Palmer* (Attorney-General) and Mr. *Waller* for the tenant for life.

Mr.

Mr. *Baggallay*, Mr. *A. Smith* and Mr. *Jackson*,  
*contra*.

1866.

GEE  
v.  
LIDDELL.  
(No. 3.)

The following cases were cited :—*Gibson v. Bott* (a);  
*Davies v. Westcombe* (b); *Morgan v. Morgan* (c); *Lord*  
*Londesborough v. Somerville* (d); *Wilkinson v. Dun-*  
*can* (e); *Scholefield v. Redfern* (f).

---

*The MASTER of the ROLLS.*

I am of opinion that the words of the will are too  
strong. He declares that "the annual or other earnings,  
proceeds or profits to arise from the said business and  
employment and navigation of the said steam or sailing  
ships or vessels shall be held, paid and applied by my  
said trustees or trustee for the time being to, for and  
upon such and the same trusts, intents and purposes as  
are hereinbefore declared and contained of and concern-  
ing the moneys to arise from the sale and collection of  
my said personal estate and effects, or as near thereto  
as the deaths of parties and other circumstances will  
admit."

Jan. 26.

Now if you take those words literally, there can be  
no question that the annual profits produced by the  
concern are to be applied exactly in the same manner  
as the proceeds of the sale of the personal estate, and  
which are to be invested, and the interest thereof when  
invested is to be paid to certain persons for life, with  
remainders over. The argument of the Attorney-General  
is, that it is the ordinary practice of merchants, before  
they ascertain what the profits are, to calculate and  
deduct

- (a) 7 *Ves.* 89.  
(b) 2 *Sim.* 425.  
(c) 14 *Beav.* 72.

- (d) 19 *Beav.* 295.  
(e) 23 *Beav.* 469.  
(f) 32 *Law J. (Chanc.)* 627.

1866.

G12

v.

LIDDELL.  
(No. 3.)

deduct interest upon the capital engaged in the trade. But I apprehend that this is only the case where there is a partnership, and where the capitals of the partners in the concern is unequally divided; but where a single person is carrying on trade, I do not apprehend that it is usual for him, in the first place, to deduct so much for interest upon his capital before he ascertains what the profits are. In addition to this, it is also to be observed, that here the expression is not "*net profits*," but "*annual profits*," which would mean all the profits that could be fairly called *annual profits* of the concern. In one sense, of course, it means *net profits*, because it means profits after deducting all expenses; but it is impossible that I can deduct the interest on the testator's capital, which he could have no desire or motive for distinguishing, unless there were some words which pointed precisely to that course.

The consequence is, that I am against *Thomas Whitaker*, and I think there must be an inquiry what were the profits *de anno in annum*, and that he ought to be allowed interest at the rate of *4l. per cent. per annum* on the profits made annually during that time, as the money was not actually invested.

---

1866.

EARL COWLEY v. WELLESLEY.

Feb. 28.

SEVERAL questions arising under the will of the testator, the late Earl of *Mornington*, were submitted for the opinion of the Court by this special case.

The owner of woodlands had been accustomed, every year, to cut about one-twelfth of the underwood and also such of the trees on the same ground as were likely to obstruct and prejudice the growth of the timber. *Held*, that the tenant for life under his will was entitled to the produce both of the underwood and trees cut according to that custom.

The testator died in 1863, having, by his will made in the same year, devised his real estate to trustees in fee, in trust, after paying certain annuities, &c. for the Plaintiff, Earl *Cowley*, for life, with remainder to Viscount *Dangan* for life, with divers remainders over.

The testator directed that the trustees should manage and superintend the management of the same premises, and that they might cut timber and underwood, from time to time, in the usual course, for sale or repairs; and he empowered them to demise all or any of the mines, minerals, quarries, stones, gravel, brickearth, clay, sand and substances. whether opened or unopened.

The trustees of a will felled some trees in the woodlands for the purpose of improving the growth of those remaining, but during the testator's lifetime the trees had not been thinned. *Held*, as between tenant for life and remainderman, that the produce was capital and not income.

The special case stated as follows:—

Part of the real estate of the late Earl of *Mornington* in *Hampshire*, consists of about 338 acres of woodland, on which there are trees and underwood both of a thriving description, the trees being principally oak. All the said woodland in *Hants* was, prior to and at the Earl of *Mornington's* decease, and has since been and is now, in hand. For many years past, the course of management has been, to cut the underwood, of from ten to twelve years growth, every year, and the underwood growing upon between twenty and thirty acres of the woodland has been cut in every year. In the en-

suing



1866.  
—  
EARL  
COWLEY  
v.  
WELLESLEY.

suings spring, it has been usual, where the underwood has been cleared, to cut down such trees as were likely to obstruct or prejudice the growth of those intended to be preserved, and which, having regard to the general improvement of the woods, should be cut down.

The trustees of the Earl of *Mornington's* will have followed this course, and have applied the proceeds of the sale of the underwood as income, and the timber, being such thinnings as aforesaid, has been partly used in repairs on the estate, and the larger part has been sold. In the spring of the year 1864, the timber and trees so sold produced the net sum of 565*l.* 3*s.* 6*d.*, and last spring (*March*, 1865) the timber and trees produced the net sum of 336*l.* 16*s.* 0*d.*, but this amount is rather above the average of the sums produced in preceding years.

Part of the real estate in the county of *Wills* also consists of woodlands, containing oak, ash, elm, Scotch fir, larch and spruce trees and underwood. During the life of the late Earl, the underwood was occasionally cut, but the trees in such woods and plantations were not thinned. It has recently been considered desirable, in order to improve the growth of the woods, to fell a number of trees, including trees of all the above-mentioned descriptions. The trees which have been felled were felled for the purpose of improving the growth of those remaining. Part of the trees so felled have been used for repairs upon the estate, and the remainder have been sold standing. The amount produced by the sale of the last-mentioned trees is 500*l.* and upwards.

Upon these circumstances the following question was submitted for the opinion of the Court:—Whether the money produced by the sale of timber in the counties  
of

of *Hants* and *Wilts*, cut as before stated, should be treated as capital or income.

1866.

EARL  
COWLEY  
v.  
WELLESLEY.

Mr. *Hobhouse* and Mr. *J. Pearson*, for the Plaintiffs, the tenants for life, contended that the money produced by the sale of timber cut in the counties of *Hants* and *Wilts* was income and not capital. They referred to *Bagot v. Bagot* (a); *Bateman v. Hotchkin* (No 2) (b); *Burges v. Lamb* (c); *Knight v. Duplessis* (d); *Pidgeley v. Rawling* (e); *Tooker v. Annesley* (f).

Mr. *Joshua Williams* and Mr. *Nalder*, for the first equitable tenant in tail, contended that the produce was *corpus*.

Mr. *Williamson* for the trustees.

*The MASTER of the ROLLS.*

With respect to the *Hampshire* property, I think that the whole produce of the wood belongs to the tenant for life. It appears to have been cut in the usual and regular course as thinnings, and the produce is therefore income.

But with respect to the trees cut on the *Wiltshire* estates, I do not think that the tenant for life is entitled to the produce as income. The trustees might have properly cut them in order to improve the growth of the others, but they had become trees, and this goes beyond thinnings in the usual course. If they had been cut because they were decaying, the produce would undoubtedly have to be invested as *corpus*.

I think, upon the statement in the case, that the produce

(a) 32 *Beav.* 509.  
(b) 31 *Beav.* 486.  
(c) 16 *Ves.* 174.

(d) 2 *Ves. sen.* 360.  
(e) 2 *Colly.* 275.  
(f) 5 *Sim.* 235.

1866.

EARL  
COWLEY

v.

WELLESLEY.

duce of the timber cut on the *Hampshire* estates is income, but that that on the *Wiltshire* estates capital, except such part as was cut in the course of regular thinnings.

The next question arose under the following statement:—

Rents and royalties of brick-fields, one of which had been leased by the testator and the other by the trustees of his will under a power, held to belong to the tenant for life.

"In 1862, the late Earl of *Marnington*, being owner in fee of fifteen acres of land at *Wanstead*, granted a lease thereof to *William Hill* for a brickfield, for a term of twenty-one years, and by the lease, a rent of 37*l.* 10*s.* was reserved and made payable in the second and every subsequent year of the term. The lease also contained a *reddendum* clause reserving by way of royalty 1*s.* 6*d.* for every 1,000 bricks, and 2*s.* for each cubic yard of the clay, brick-earth, loam, sand and other materials to be dug, raised or gotten and used for other purposes than making bricks, and a minimum rent of 112*l.* 10*s.*"

The amount payable in respect of the royalty had during the past year amounted to a much larger sum than the sum of 112*l.* 10*s.*

Since the testator's death, his trustees had, in pursuance of an arrangement made by the Earl in his lifetime and under the leasing power contained in his will, granted a lease to the said *William Hill* of an adjoining piece of land also for a brickfield, reserving similar rents and royalties.

Upon these circumstances the question was, whether the royalties payable under the brickfield leases should be applied as capital or income.

*The MASTER of the ROLLS.*

I think that the lease being made by the trustees makes no difference, and that it is clear, from scope of leasing

leasing power, that the leases were intended for the benefit of the tenant for life.

1866.



EARL  
COWLEY  
v.

WELLESLEY.

The next question arose upon the following statement:—

“The late Earl of *Mornington*, as lord of the manors of *Wanstead*, was, and since his death his trustees have been, in the habit of selling, in various quantities, gravel, loam, peat, and bog-earth, dug and taken from the waste lands of the said manors, and such sales have produced from three to four hundred pounds annually, the profits of the said manors are only such as have usually, for many years past, been gained by working the gravel-pits and the loam, peat, and bog-earth in ordinary and usual course of demand for the same every year.”

The produce of gravel, loam, &c., sold by the trustees according to the course pursued by the testator, held income and not *corpus*.

The question submitted on these facts was, whether the money produced by the sale of the gravel, &c., was capital or income.

*The MASTER of the ROLLS.*

I think it belongs to the tenant for life. As to the pits open in the testator's life there can be no question, and as to opening new pits it is like a case before me (*a*), where a testator worked mines, and after his death it became convenient to sink a new shaft, and I held it was a working of the old mine. I treat this case like that of a mine worked at one place where another shaft is opened in order to work it more conveniently. I do not think that one pit on a large field is to be considered as a separate mine. The minerals being won in the ordinary course, the produce is therefore income.

The

(*a*) *Spencer v. Scurr*, 31 *Beav.* 334.

1866.

EARL  
COWLEY  
v.

WELLESLEY.

Fines for admission received by the trustees of a manor upon grants of parts of the waste, held to belong to the tenant for life.

The next question arose on the following statement:—

“The late Earl of *Mornington* was, at the time of his decease, seised in fee of manors of *Wanstead*, &c. And the trustees of his said will have, since his death, as lords of the said manors, with the consent of the homage according to the customs of the said manors, made grants to divers persons of portions of the waste lands of the said manors, and fines have been paid in respect of the admissions on such grants to the trustees or lords of the said manors. The fines paid on admissions on grants exceed considerably in amount the fines paid on admissions on surrenders or admissions on death or under a will; these latter fines have been and are treated as income. In some cases, grants have been made subject to certain restrictive conditions as to building, and the trustees, as lords of the manors, may hereafter be applied to for releases or a waiver of those conditions in consideration of a sum of money to be paid to them by the persons requiring the same.”

The question was, whether the fines paid on grants of waste lands of the manors, and the consideration moneys for releasing conditions, as before stated, should be considered capital or income.

Mr. *Hobhouse* for the tenants for life.

Mr. *Joshua Williams* for the tenants in tail.

*Brabant v. Wilson (a)* was cited.

*The MASTER of the ROLLS.*

Where the grants have been made by the trustees, the fines would be income.

As

(a) 14 *Week. Rep.* 28.

As to the conditions, I agree, that if imposed by the testator, he made them for benefit of inheritance, and I doubt whether the trustees could release the condition and the tenant for life get the benefit of it. But if the grants were made by the trustees, then, inasmuch as they might have made them without any condition, they may release them, and the profits would belong to the tenant for life. The grants are the ordinary mode of enjoying a manor.

1866.

EARL  
COWLEY  
v.  
WELLESLEY.

The next question was this:—

“Since the death of the late Earl of *Mornington* several enfranchisements have been effected in the said manors, and, in some cases, preliminary fines have been paid to the trustees, as lords of the manors, by the persons enfranchising, by reason of the admission having taken place before *July*, 1853, as is mentioned and provided for by the Copyhold Act of 1852.”

Preliminary fines received on enfranchising copyholds by reason of the admission having taken place before *July*, 1853, as is mentioned in the Copyhold Act, 1852 (15 & 16 *Vict.* c. 51), held to belong to the tenant for life.

15 & 16 *Vict.* c. 51 (30 *June*, 1852); 21 & 22 *Vict.* c. 94 (2 *August*, 1858), were cited.

*The MASTER of the ROLLS.*

I think this must be treated as income.

The next question was this:—

Since the death of the late earl, the trustees, as lords of the manors of *Wansted*, &c., “have, with the consent of the homage, according to custom of the said manors, respectively, made grants of waste lands (parts of the said manors) to a trustee for them and for the benefit of the estate of the late earl and the persons interested therein. Upon such grants being made, it has been necessary to

Expense of fencing waste lands of a manor granted to a trustee for the benefit of the estate, held payable out of *corpus*.

1866.



EARL

COWLEY

v.

WELLESLEY.

fence in the lands so granted; and the said trustees have paid the expense thereof out of moneys in their hands.

The question was, whether the expense of fencing the lands so granted to a trustee for the lords of the manors should be paid out of capital or income.

Mr. *Hobhouse* for the tenants for life.

Mr. *Joshua Williams* referred to *Dent v. Dent* (a).

*The MASTER of the ROLLS.*

This comes under the power to make improvements done by the trustees, which they are entitled to pay out of *corpus*.

Costs of trustees of rendering the necessary accounts for the purpose of paying the succession duty in respect of the life estate, held payable by the tenant for life.

The last question arose out of these facts :—

By the will of the late earl, the Plaintiff Earl *Cowley* was made the first equitable tenant for life of the estates thereby devised, and it became necessary to render to the *Inland Revenue Office* an account of the estates, for the purpose of paying the succession duty in respect of his life interest. The trustees prepared and rendered such account to the *Inland Revenue Office*, and had paid the costs, charges and expenses of preparing and rendering the same, which were considerable.

The question was, whether the costs, charges and expenses of preparing and rendering the account of the succession duties ought to be paid out of capital or income.

Mr. *Hobhouse*. These expenses have been incurred not for the tenant for life alone, but will be for benefit of

(a) 30 *Beav.* 363.

of estate and all those entitled to it under the will. The costs ought to be borne by the *corpus*.

1866.

EARL  
COWLEY  
v.  
WELLESLEY.

*Mr. Joshua Williams.* If the legal estate had not been outstanding, the tenant for life would have had to make the return and to pay all the expenses. The only object of the return is to ascertain what the tenant for life ought to pay.

*Mr. Hobhouse* in reply.

*The MASTER of the ROLLS.*

I think the tenant for life must pay these costs.

The costs of this special case will be paid out of the residuary personal estate.

---

BOUCK v. BOUCK.

**T**HIS case came before the Court upon general demurrer to the bill, which, in substance, stated the following case :—

*Apr. 18.*

A bill by one of the next of kin to administer the estate and to set aside a conveyance by him of part of it is multifarious.

The testator died in 1865, leaving two sons, namely, *Edward* (the Plaintiff) and *John* (a Defendant). *John* obtained letters of administration and possessed himself of the testator's estate, and the Plaintiff sought to have the estate administered and distributed amongst the parties entitled thereto.

But, in addition, the bill stated an indenture dated the 19th of *October*, 1865, whereby the Plaintiff had as-



1866.

BOUCK  
v.  
BOUCK.

signed to two trustees so much of his share of the residuary estate as would raise 8,000*l.*, upon trust for his wife *Hannah Bouck*, for her separate use for life, with remainder over. The Plaintiff alleged that this deed had been executed by him without consideration and due professional advice, that it was void as against public policy, and that it ought to be set aside or modified. The administrator and the parties to the deed were made Defendants to the bill, which, in addition to the administration of the estate, asked that the deed of *October*, 1865, might be declared void and be set aside, or that it might be modified by a reduction of the amount to 4,000*l.*

To this bill the Defendant *John Bouck* demurred, on the ground that it was exhibited "for several independent and distinct matters and causes which had no relation to each other, and in some or one of which he was in no way interested or concerned, and ought not to be implicated, and that the bill was multifarious."

Mr. *Baggallay* and Mr. *Parke*, in support of the demurrer, cited *Salvidge v. Hyde* (a); *Mole v. Smith* (b); *Whaley v. Dawson* (c); *Jerdein v. Bright* (d).

Mr. *Graham Hastings* in support of the bill. The Plaintiff is entitled to have the estate administered and distributed, and this cannot be done without ascertaining the parties interested in it. It therefore becomes necessary, even for the demurring party, that the validity of the deed should be ascertained. The Defendant is interested in every part of the relief prayed, and cannot say he is not concerned therein. Nothing can be gained by

(a) *Jacob*, 151.  
(b) *Jacob*, 494.

(c) 2 *Sch. & Lef.* 367.  
(d) 2 *John. & H.* 323.

by allowing this demurrer, for then two suits will become necessary, one to set aside the deed, and the other to administer the estate; *Bent v. Yardley* (a); *Campbell v. Mackay* (b); *Addison v. Walker* (c); *Parr v. The Attorney-General* (d); *Chambers v. Crabb* (e).

1866.

BOUCK  
v.  
BOUCK.

*The MASTER of the ROLLS.*

I am of opinion that the objection to the frame of this bill is one of substance, and that the distinction between this and the cases cited is very obvious. Where an ascertained fund is in the hands of a trustee and three or four persons claim it, any one of these persons may file a bill to obtain it and make all the other claimants and the trustee parties; or the trustee may get rid of all responsibility by paying the money into Court, or by filing a bill of interpleader against all the claimants. But if a Plaintiff files a bill for the administration of the estate of a testator or of an intestate, and he mixes it up with a question whether he has conveyed his share to another, or whether the conveyance ought to be set aside, the case is very different and the trustee cannot dispose of the estate. The accounts are shut up until it is ascertained who is entitled to it, and the costs and all other payments are delayed. You might have questions between six or seven *cestuis que trust* and their incumbrancers, and these questions would then have to be determined before the right to have the accounts taken had been made out, for otherwise, after they had been taken, a person might come in and dispute them and raise a question whether any particular item ought or not to be allowed. I think the Plaintiff is not entitled to oblige the legal personal representative to take the evidence

(a) 2 Hem. & M. 602.

(b) 1 Myl. & Cr. 603.

(c) 4 Y. & Coll. (Exch.) 442.

(d) 8 Clark & Fin. 409.

(e) M. R. (unreported).

1866.

*Bouck*  
v.  
*Bouck*.

dence as to the validity of the deed or to be mixed up with that question at the hearing. I think that the authorities cited are quite sufficient to compel me to allow this demurrer. I think that the legal personal representative is not a proper party here for the discussion of the question between the Plaintiff and the parties claiming under his deed, and that I must allow the demurrer with liberty to amend.

*Re* THE ENGLISH, &c. ROLLING STOCK  
COMPANY.

LYON'S CASE.

*Apr.* 24.  
*May* 2.

Alteration of the articles of association of a company between an application for shares and their allotment, held not to invalidate the allotment, such alteration being made under the authority of the "Companies Act, 1862," and the objects of the company not being thereby altered.

**T**HIS was an application, made by Captain *Lyons*, to strike off his name from the list of contributories.

The company was formed in *January*, 1864, and the provisions of Table A. in the first schedule of "The Companies Act, 1862" (25 & 26 *Vict.* c. 89), were adopted as the articles of the association, but with some variations.

On the 7th of *March*, 1864, Captain *Lyons* applied for fifty shares in the company; but before they had been allotted, and on the 28th of *March*, a change was made

The prospectus of a company stated, that the capital consisted of 15,000 shares of 10*l.* each; first issue 10,000 shares. *A. B.* applied for shares, which were allotted to him. *Held*, that *A. B.* could not resist being put on the list of contributories, on the ground that less than 900 shares had ever been taken.

Shares were allotted to *A. B.* at a meeting of three directors, and before the number necessary to form a *quorum* had been determined. *Held*, that *A. B.* could not, upon the Company being wound up, insist that the allotment to him was invalid.

made in the articles of association, the effect of which is stated *post* in the judgment of the Court.

1866.



Re

THE ENGLISH,  
& C. ROLLING  
STOCK  
COMPANY.

LYON'S CASE.

The shares were afterwards allotted to Captain *Lyons*, three directors being present at the time of the allotment; at that time, no regulation as to the *quorum* of directors had been made; but it was afterwards fixed at three. In *December*, 1864, Captain *Lyons* paid a call on his shares.

The grounds on which the applicant relied in support of his application were as follows:—first, that there had been a misrepresentation in the prospectus, in stating that the capital consisted of 15,000 shares of 10*l.* each, “first issue 10,000 shares,” whereas no more than 866 had ever been subscribed for, and also in stating that the directors had received promises of a contract. Secondly, that the articles of association had been varied after Captain *Lyons*’ application for the shares. Thirdly, that the shares had been allotted at a meeting of directors at which there was not a sufficient *quorum* present.

Mr. *Selwyn* and Mr. *Kekewich* in support of the application. Captain *Lyons* is not a contributory. First, he is released by reason of the false representations contained in the prospectus, that 10,000 shares had been issued, whereas no more than 866 have ever been subscribed for. Captain *Lyons* agreed to become a shareholder in a company consisting of 15,000 shares, and the directors were not justified in commencing business until that number or a reasonable number of shares had been subscribed for, and at law the company could not support an action for calls; *The Howbeach Coal Company v. Teague* (a) Secondly, Captain *Lyons* applied for

(a) 5 *Hurl. & C.* 151, and 6 *Jurist*, 275.



pudiating the shares at once, he in *December* paid the call on them; it is therefore too late now to reject the shares; *The Malt and Hop Company (a)*.

Thirdly. The allotment was duly made by the directors present (Table A, ss. 52, 53), and was valid, though the *quorum* had not been then settled.

If this application were to succeed, the consequence would be, that every allotment of shares would be invalid, and no one would be liable but the seven persons who signed the memorandum of association for a limited number of shares; and even the Petitioner who obtained the winding-up order will not be a contributory. Shareholders may have rights as against the directors; but here the question does not arise between them, but between the shareholders and the public.

Mr. Selwyn, in reply, cited *Reese River Silver Mining Company (b)*.

---

*The MASTER of the ROLLS.*

The grounds on which the applicant in the present case asks to be taken off the list of contributories are these:—He says, first, that there was a fraudulent misrepresentation. Secondly, that an alteration was made in the objects of the company between his application for the shares and the allotment of them to him. And, thirdly, that there was not a proper *quorum* of directors present when the allotment was made.

The prospectus stated that the number of shares was to be 15,000, and that the first issue was to be 10,000 shares,

(a) 35 *Beav.* 273.

(b) 36 *Law J. (Chanc.)* 385,  
618.

1866.

Re  
THE ENGLISH,  
& C. ROLLING  
STOCK  
COMPANY.  
LYON'S CASE.

May 2.

1866. shares, and Captain *Lyons* in his affidavit says that he  
 ~~~~~ relied on this statement. He also alleges that, in a  
Re passage in the prospectus, it is stated that the directors
 THE ENGLISH, &c ROLLING had received promises of a contract. But I do not find
 STOCK any evidence to shew that that statement was false; and
 COMPANY. after all a mere promise amounts to very little. If it had
 LYON'S CASE. asserted that they had entered into a contract, and if, on
 the faith of that, he had applied for shares, it would be
 a very different thing. The rest of the prospectus com-
 plained of is a mere statement of the benefits which
 was expected to be derived from the establishment of
 the company.

The only substantial thing is the statement, that the first issue was to be 10,000 shares, and Captain *Lyons* says that he relied on it, and that less than 900 shares only were applied for, and therefore he cannot be called on to contribute. In support of this, the case of *Howbeach Coal Company v. Teague (a)* was cited, in which Baron *Martin*, at the trial, held, that where something less than one-third of the whole shares in the company had been subscribed for, the directors were not justified in suing for calls. But when that case was heard in banc, though Baron *Martin* adhered to that opinion, yet, on that part of the case, the Court gave no decision; on the contrary, some of the other judges hesitated on the subject. But I have referred to the case of the *Pyrographic Woodwork Company v. Brown (b)*, in which the full Court came to a contrary conclusion. I cannot, therefore, hold that the fact of only 900 shares being taken is such a fraud as to invalidate the application for shares. Directors might reasonably allot shares if they have a reasonable expectation of the success of the undertaking, provided it is not done for any fraudulent purpose. If a person applying for shares desires to make the sub-
 scription

(a) 5 *Erch. Rep.* 151.(b) 2 *Hurl. & Coll.* 63.

scription of the whole number of shares a condition, he ought to inquire. I cannot hold that the fact of the directors allotting shares before they have a sufficient number to carry on the concern is a sufficient ground for taking a contributory off the list, especially if they have reasonable expectations of being able to carry on the concern. I think, therefore, I cannot remove this gentleman from the list on the ground of misrepresentation.

1866.
Re
THE ENGLISH,
& C. ROLLING
STOCK
COMPANY.
LYON'S CASE.

The second ground is this:—that there was an alteration in the objects of the company between the application for the shares and their allotment. But really there was no alteration in substance. They cancelled the articles of association and executed new ones, which were quite within the object stated in the prospectus, which do not enable them to carry on a distinct and separate trade from that originally intended.

The third ground is this:—Captain *Lyons* says that there was no sufficient *quorum* of directors present when the shares were allotted to him. It appears that three directors were present, but that it had not been then established how many should form a *quorum*. It was afterwards determined that three should be a *quorum*, and three were present upon the allotment to Captain *Lyons*, and the same was done as to the other shareholders.

I am of opinion that a sufficient case is not made out to take Captain *Lyons* off the list, and that he must remain a contributory.

1866.

May 23.

June 1.

DENTON v. MACNEIL.

Prospectuses of a company are always colored, but if a material fact is stated in them which is untrue, and upon the faith of which a person takes shares, he is entitled, as against the company, to require allotment of those shares to be cancelled and his deposit repaid.

The remedy for recovering the deposit on shares is by action at law and not by bill in equity.

A bill by one of several projectors of an abortive company against his co-projectors for repayment of moneys expended by him in attempting to carry out the project cannot be maintained; the bill should pray a general account of the expenditure and a due adjustment between all the projectors.

TWO patents had been granted in 1852 and 1854, respectively, to Dr. *Smith* for converting scoræ, lava, slag and other refuse obtained from the smelting of iron, lead and copper ores, into a material fit for paving, flagging, tiling and general building purposes.

The Defendant Sir *John Macneil* and others thereupon attempted to establish a company called "The British Slag Company" for the purpose of working these patents, and in *May*, 1855, they registered the company, provisionally, under the Companies Act, 1844, (7 & 8 *Vict.* c. 110,) but it was never completely registered.

They issued a prospectus which stated that they had purchased the patents "for a fixed sum, the payment of which depends on the complete success of *such further testing* as hereinafter referred to."

"The practical working of this invention *has been tested* with a view to ascertain the necessary capital required for the cost of the construction and machinery and for the cost of production of the material."

The cost of the article will not "exceed 10s. a ton, *so far as the testing which has taken place* will permit the directors to judge, but, before any large outlay is made, they propose erecting limited works at first, which will enable them to say with perfect certainty the exact cost."

On the faith of the statement in the prospectus, the
Plaintiff,

Plaintiff, in *October*, 1855, took 200 shares in the company.

1866.

DENTON

v.

MACNEIL.

The projectors afterwards became desirous of bringing the company under the Limited Liability Act, and they issued a second prospectus, but this project was not carried into execution.

The company took *The Maesteg Works* and commenced operations, and the Plaintiff, at his own request, was, in *January*, 1858, employed in superintending the works at a salary, and he continued to do so until *March*, 1859.

The project turned out unsuccessful and was abandoned.

The Plaintiff instituted this suit in *December*, 1863, alleging that the representations made by the promoters, and upon the faith of which he was induced to take the 200 shares, were false and fraudulent, and praying an account, and that the Defendants, the promoters, might pay to him what he had paid in respect of the 200 shares, and also the moneys advanced by him in carrying on the undertaking on the faith of certain agreements entered into by him, and might also pay him for his services from *January*, 1858, to *April*, 1860. And that if the Court should hold the Defendants not liable to recoup to the Plaintiff the whole amount advanced by him for works, then for a declaration that the Defendants were liable to contribute thereto, in such proportions as the Court should deem just.

Mr. *Locock Webb* and Mr. *Horsey* for the Plaintiff, cited *Pulsford v. Richards* (a); *Colt v. Woollaston* (b); *Evans*

v.

(a) 17 *Beav.* 87.(b) 2 *Peere-Wms.* 154.

1866.

DENTON

v.

MACNEIL.

v. Bicknell (a); Cooper v. Webb (b); Green v. Barrett (c).

Mr. Selwyn, Mr. Baggallay, Mr. E. Karlake, Mr. W. R. Ellis, Mr. Macnaghton, Mr. Eddis, Mr. W. W. Mackeson and Mr. J. N. Higgins for the Defendants, were not heard.

The MASTER of the ROLLS.

June 1.

In this case I think the Plaintiff fails.

I will state how the matter stands. It appears that two patents were taken out by Dr. Smith in *October*, 1852, and *August*, 1854, for the purpose of converting scoriæ and slag into materials apparently of the nature of marble. Upon that, several gentlemen, in *May*, 1855, determined to set up what was called "The British Slag Company," and they registered the company under the Act of 1844. They issued a prospectus, under which the Plaintiff applied at the office of the company and obtained in *October*, 1855, an allotment of 200 shares. After that, the persons who had set up the first company were desirous of having the company formed under the Limited Liability Act, and thereupon they, in *June*, 1856, issued a second prospectus. The Plaintiff's first complaint is, that he was taken in and misled by the statement in the prospectus of the company, which was false and fraudulent. He complains that the prospectus states, that "the practical working of this invention had been tested, whereas, in fact, the invention had not been properly and sufficiently tested." But the first answer is, that the

(a) 6 Ves. 183.
(b) 15 Sim. 454.

(c) 1 Sim. 45.

the prospectus itself shews that a further and more complete and perfect testing was intended to be made, and everybody was invited to look at their works for the purpose of seeing whether the testing was sufficiently made or not.

1866.

W
DENTON
v.
MACNEIL.

In regard to the statements in a prospectus I adopt the observations made by Lord Justice *Turner* in *Kisch v. The Central Railway of Venezuela* (a), that it is "universally known and understood that the prospectus of a company never, in fact, contains a strictly accurate account of its prospects and advantages." Everybody understands that a prospectus is colored in this sense, that everything is put forward in the most favorable view it can be. But this does not justify a material statement which is totally false, and I am of opinion that if a material fact is stated in the prospectus which is untrue, and upon the faith of which a person takes shares, he is entitled, as against the company, to require the allotment of those shares to be cancelled and to have the amount he has paid for deposit and the like returned to him.

But I do not think that the statement in this prospectus is sufficient for that purpose. It speaks of a testing having been made, but also that it was only to a certain extent, and of an intention to make further testings, and there is no question but that all the persons who established this company *bonâ fide* intended and believed that they could establish a good and *bonâ fide* company.

The other answer to this complaint of the Plaintiff is, that, in point of fact, the company has never been established, and that there are no shares to be returned.

There

(a) 34 *Law J. (Chanc.)* 552.

1866.
DENTON
v.
MACNEIL.

There were shares in a company which had been *provisionally* registered, but this company does not exist, for they found they could not carry it into effect, and accordingly it has no existence. It also appears that after several letters from the Plaintiff's solicitors to the Plaintiff in *October* and *November*, 1857, the Plaintiff proposed to Sir *John Macneil*, in *January*, 1858, that he should go down and superintend the management of the great oven at a place called *Maesteg*, and accordingly he did so, with the sanction of the directors at a meeting on the 30th *January*. He must very soon, in 1858, have seen what was the nature of the undertaking, but he takes no steps whatever in the matter, and this bill is not filed until *December*, 1863, although in the beginning of 1858 he must have been perfectly well aware of the state of circumstances. There were, therefore, very nearly six years from the time that he first went down to superintend these works to the time of the filing of the bill. In my opinion therefore he fails, first, because if there were shares in a company which he required to have cancelled, he must make out that he has been fraudulently deceived, which in my opinion he does not do; secondly, because he must have known exactly in 1858 how the matter stood, and yet he takes no steps for nearly six years afterwards; and thirdly, because there is no company to which the shares can be returned.

If the Plaintiff required the repayment of his deposit, because he has no shares, as in point of fact none exist, the proper mode would have been to bring an action at law for it. He could have maintained an action, supposing that he has merits in the case, and it would not have been necessary to come into equity for that purpose.

The Plaintiff might possibly be entitled to some remuneration

muneration from Sir *John Macneil* and the other directors for his superintendence of the affairs of the company and for his services, and the bill makes some claim in that respect. But if that be so, the Plaintiff's proper remedy would be by an action at law upon the agreement between him and the directors, and not by bill in equity.

1866.

 DENTON
 v.
 MACNEIL.

The only other ground on which, in my opinion, it would have been possible for the Plaintiff to maintain his suit is this:—He might have said, "I was one of several persons who endeavoured to form a company, and for that purpose we paid a great deal of money in endeavouring to bring out a joint concern for our common benefit, and in which undertaking we were partners. But I have paid more than my share, and you are bound, upon a due account being taken, to repay what I have overpaid. We endeavoured to produce a certain work, we were, so to say, tenants in common or jointly interested in the affair, and we ought to bear the liabilities jointly between us." But I find that no such case is made by the bill. It asks that the Defendants may pay the Plaintiff what he has advanced, and not that all the expenses of every sort and description of this concern should be ascertained and borne *pari passu* by everybody concerned. It appears that considerable expenses have been incurred, that the directors have been compelled to repay some of the deposits paid upon applications for shares, and there must have also been office and other expenses incurred. But all that the Plaintiff proposes is, that the whole of what he has spent shall be repaid him, or else that the Defendants may contribute to what he has spent, but not that all the expenses shall be ascertained, he undertaking to pay what, if anything, should be found due from him on taking the account, which very possibly might turn out against him. It is

1866.

DENTON

v.

MACNEIL.

obvious that it is not the scope and object of the suit to have a mutual contribution to all the expenses.

That being my view of the case, I think the Plaintiff fails. He knew what he was about, and if he has any remedy, it is at law, and he cannot come into equity on a bill framed as this is. I am of opinion, therefore, that the bill must be dismissed with costs.

May 31.
June 4, 11.

GEE v. LIDDELL. (No. 4.)

The meaning of the word "survive," in a limitation of property, is, that the person to survive shall be living at the time of the event which he is to survive; it does not mean living at any time whatever after the event referred to. Consequently, a gift over, if there should be no child or remoter issue of A. B. who should survive the testator and A. B., and should live to attain twenty-one, is not void for remoteness.

THE testator, by his will, dated in 1855, demised and bequeathed his real and personal estate to trustees and (subject to certain trusts which it is unnecessary to state) upon trust for his nephew, *Thomas Stephen Whitaker*, for life, with remainder to the children of *Thomas Stephen Whitaker* who should attain twenty-one.

And he provided, that if any of such children should die before attaining twenty-one leaving issue at his decease, such issue should take his parent's share. But, in case any such child of his nephew should die under twenty-one without leaving issue, or leaving such they should all die before attaining twenty-one, then his share should be equally divided amongst the other children then living and the lawful issue of such of them as should be then dead, such issue taking their parent's share.

Then followed the clause on which the question turned, which was as follows:—

"Provided always

"Provided always and I do hereby declare and direct, that *if there shall be no child or children or remoter issue of my said nephew who shall survive me and my said nephew* and shall live to attain the age of twenty-one years, then and in such case, the whole of my said real and residuary personal estate and effects, moneys and premises hereinbefore devised and bequeathed, shall, after the decease of my said nephew and such failure of issue as aforesaid, go over and be in trust for and to be conveyed, surrendered, assigned, paid and applied unto and for my three cousins, *George William Moore Liddell* and the said *William Liddell* and *Charles Liddell*, their heirs, executors, administrators and assigns for ever, according to the nature and quality thereof respectively, in equal shares as tenants in common,"

1866.
GEE
v.
LIDDELL.
(No. 4.)

Charles Liddell having died a bachelor, the testator, in 1857, made a codicil to his will, and he thereby revoked the gift to the three *Liddells*, and after making certain devises in favor of the Plaintiffs *William Gee*, *John Gee* and *Walter Gee*, he made an ultimate and residuary gift, the validity of which was contested, to *George W. M. Liddell* and *William Liddell*, their heirs, &c.

The testator made a second codicil in 1859, whereby he revoked the ultimate gift of his residue to the two *Liddells*, and he gave it to the three Plaintiffs, *William R. Gee*, *John Gee* and *Walter M. Gee*, their heirs, &c.

The testator died in 1860, leaving his nephew *Thomas Stephen Whitaker* his heir-at-law, who had never had a child.

1866.
 GEE
 v.
 LIDDELL.
 (No. 4.)

This suit was instituted by the three *Gees* against *George W. M. Liddell, Wm. Liddell* and *Mr. Hickman* (the three trustees and executors), and against *Thomas Stephen Whitaker*, for execution of the trusts of the will and the administration of the estate.

The question was, whether the gift over to the Plaintiffs was not too remote, for if so, they would then have no sufficient interest in the residue to enable them to continue the suit. This depended (as was held) on the validity of the gift to the three cousins set forth in the above proviso.

Mr. Baggallay, Mr. A. Smith and *Mr. Jackson*, for the three Plaintiffs *W., J. and W. Gee*, argued that "issue" was to be construed "children," that the limitation was not too remote, there being a double contingency, and the ultimate gift being so worded as to take effect in the event of the three nephews surviving living persons. They cited *Festing v. Allen* (a); *Evers v. Chalis* (b).

Sir R. Palmer (Attorney-General) and *Mr. Waller*, for *Thomas S. Whitaker*, the heir-at-law and next-of-kin, argued that the gift over, in the event of there being no children or remoter issue of the nephew who should attain twenty-one, was clearly too remote, as it would not necessarily take effect within the period of a life in being and twenty-one years after; that surviving the testator and his nephew meant living at any time after their deaths, and must have reference to the previous gifts.

They

(a) 12 *Mee. & Wel.* 279, and 5 *Hare*, 576. (b) 7 *H. of L. Cas.* 531, and 18 *Q. B.* 224.

They cited *Dungannon v. Smith* (a); *Deerhurst v. Duke of St. Albans* (b); *Ware v. Polhill* (c).

1866.
GEE
v.
LIDDELL.
(No. 4.)

Mr. Rendall, for William Liddell, argued that the substituted gifts by the codicil were void for remoteness; that the object of the revocation was merely to give effect to the substituted gift in favor of other persons, and that if those substituted gifts failed, the revocation, introduced only for the purpose of such substitution, became ineffectual, and that the original gift to the Liddells remained intact. He distinguished the case of a simple revocation from a revocation accompanied by a substitution. Secondly, he insisted that that gift to the Liddells was not too remote, as the survivorship was limited to the period of the death of the testator and his nephew. He cited *Onions v. Tyrer* (d); *Lewis on Perpetuities* (e); *Re Thatcher* (f); *Ex parte Earl of Ilchester* (g); *Robertson v. Powell* (h); *Barclay v. Maskelyne* (i); *Jarman on Wills* (k).

Mr. Baggallay in reply.

The MASTER of the ROLLS.

The question on this will and the two codicils is, whether the gifts contained in them upon the failure of the children or remoter issue of the nephew is or is not too remote, and if not, then who is entitled under the gift over.

June 11.

[His Lordship stated the limitation of the residue in the will to the nephew and his children.]

The

- | | |
|--|---------------------------------|
| (a) 12 Cl. & Fin. 546. | (e) Page 506. |
| (b) 5 Madd. 232, and 2 Cl. & Fin. 611. | (f) 26 Beav. 365. |
| (c) 11 Ves. 283. | (g) 7 Ves. 348. |
| (d) 1 Peere Wms. 343, and Pr. Ch. 459. | (h) 10 Jurist, 442. |
| | (i) Johns. 125. |
| | (k) Vol. 1, p. 156 (3rd edit.). |

1866.

~~~~~

GEE  
v.LIDDELL.  
(No. 4.)

The gift over is "if there shall be no child or children or remoter issue of my said nephew *who shall survive me and my said nephew* and shall live to attain the age of twenty-one years."

Now this gift over is clearly too remote, unless the effect of the word "*survive*" is to confine the happening of the event on which it is to take effect to the day of the death of the survivor of the testator and his nephew.

It is argued that the word "*survive*" imports that the person to survive must be living at the death of the person whom he is to survive, and that it cannot, according to the ordinary import of the words (to give an instance) be said that *Geo. III.* survived *William III.* That it is true that *Geo. III.* survived his father and his grandfather, but that he did not survive *Geo. I.* or any of the other monarchs who preceded him on the throne of this realm.

In answer to this, it is argued that the meaning of the word "*survive*" is more extensive, because if it were so restricted it would defeat the previous gift to the remoter issue of the nephew, which I have read and which clearly is not confined to the children living at the death of the nephew. It is true that this criticism is correct to this extent:—that the gift over would, if so construed, have that effect; but I think that this result ought not to induce the Court to give any other than the ordinary meaning to the words used by the testator.

My opinion is that the meaning of the word "*survive*" or "*survivor*" imports that a person who is to survive must be living at the time when the event which he is to survive happens. I have consulted several dictionaries

dictionaries on this subject, such as *Johnson* and *Richardson* and the authorities cited by them, and it appears to me in all instances to mean *to outlive*, that is, to be alive at the time of a particular event or the death of a particular person, which event or person the other is to survive. It is true that Dr. *Johnson* puts, as one of the meanings, "to live after the death of another," which, if taken in its full sense, would bear out the meaning contended for by the Defendants. But all the passages cited from the English writers tend to the conclusion, that the person who survives an event must be living at the time when that event takes place. The expression *to live after* is somewhat ambiguous in itself, and it is not the ordinary meaning as contended for by the Defendants. I also think that, in construing wills, words ought to have such meaning given to them (to use the expression used in the celebrated case of *Forth v. Chapman* (a) ), that *res magis valeat quam pereat*.

I think, therefore, that the word "*survive*," properly speaking, imports that to prevent this gift from taking effect the remoter issue of the nephew must be alive at the death of the survivor of the testator and his nephew, and consequently that the gift over is confined to the contingency which gives effect to it taking place at the death of the survivor of the testator and his nephew; that consequently the gift over is not too remote, and that on the will alone, if unaffected by the codicils, the gift over to the three cousins *George William Moore Liddell*, *William Liddell* and *Charles Liddell* would take effect.

[His Lordship next considered the effect of the two codicils, which it is unnecessary to state further than he came to the following conclusion :—]

I am, therefore, of opinion that the Plaintiffs have a  
sufficient

(a) 1 *Pierre Wms.* 663.

1866.

GEE  
v.  
LIDDELL.  
(No. 4.)

1866.  
GER  
v.  
LIDDELL.  
(No. 4.)

sufficient *locus standi* to enable them to maintain and continue this suit, as, in some possible events, they may become interested in the property; but I shall make no declaration of rights until the event arises which makes this necessary.

---

AN  
INDEX  
TO  
THE PRINCIPAL MATTERS  
CONTAINED IN THIS VOLUME.

---

ABATEMENT.

A person served with the decree afterwards married:—*Held*, that the proper way of bringing the trustees of her marriage settlement before the Court was by service of the decree. *White v. Stewart*. Page 304

ACCOUNT.

1. *A. B.*, who was both heir and administrator, gave to a creditor of the intestate a mortgage on the descended estate for his debt, which he covenanted to pay. The creditor thereupon gave to *A. B.*, as administrator, a receipt for the debt, but no money passed:—*Held*, in taking an account of the personal estate of the intestate as against *A. B.*, that he was entitled to charge the amount of this debt as a payment out of the personal estate. *George v. George*. (No. 2.)

382

2. A bill by one of several projectors of an abortive company against his co-projectors for repayment of moneys expended by him in attempting to carry out the project cannot be maintained; the bill should pray a general account of the expenditure and a due adjustment between all the projectors. *Denton v. Macneil*. Page 652

ACTION.

*See* RECTIFICATION OF REGISTER.

ACT OF BANKRUPTCY.

In *March*, a trader assigned all his goods, &c. to *A. B.*, to secure a composition to his creditors, and *A. B.* became liable for the payment. The wife of the trader became surety to *A. B.* in respect to her separate estate. In *November*, the trader was made bankrupt, and *A. B.* entered into an arrangement by which he gave up the goods to

the assignee:—*Held*, that *A. B.*'s assignment was an act of bankruptcy, and that the wife's separate estate as surety was not released. *Hardwick v. Wright.* Page 133

#### ACT OF PARLIAMENT.

A testator directed his executors to apply 600*l.* in getting an act of parliament to confirm an invalid disposition made by him of real estate to a charity:—*Held*, that this imposed no duty or obligation on the executors. *Wickham v. Marquess of Bath.* 59  
See SCHOOL.

#### ACQUIESCENCE.

1. Acquiescence in one breach of covenant, not considered material, will not prevent the covenantee complaining of another breach which affects the value of his property. *Western v. Macdermot.* 243
2. A shareholder, who had taken shares on the faith of a prospectus, afterwards discovered that by the articles of association the objects of the company materially differed from those stated in the prospectus. He subsequently dealt with the shares as owner, by attempting to sell them:—*Held*, that he had acquiesced and could not afterwards repudiate them on the ground of the misrepresentation. *Re The Hop and Malt Exchange and Warehouse Company (Limited).* *Brigg's Case.* 273

#### ADMINISTRATION.

After a decree in an administration suit for payment of the debts and of the remaining assets to the parties entitled, persons in *France*, claiming as creditors, and who had not come in under the decree, took proceedings there against the executors: on the petition of the executors the order for payment to the beneficiaries was stayed. *Brett v. Carmichael.* Page 340

See ACCOUNT, 1.

ADMISSION OF ASSETS.

SEPARATE ESTATE, 5.

STATUTE OF LIMITATIONS.

#### ADMISSION OF ASSETS.

1. Distinction between a decree to administer the estate of *A. B.* and a decree directing his legal personal representative either to admit assets or to account. *George v. George.* (No. 1.) 350
2. When, after a decree directing a legal personal representative to admit assets or account, he pays debts, he will be allowed them, though the estate should prove deficient. But when such a payment is made after a decree for the administration of the estate the rule is otherwise. *Ibid.*

#### AFFIDAVIT.

Remarks on the impropriety of making the statutory affidavit, as to belief in the statements of a petition to wind up, without inquiry as to the truth of such state-

ment. *In re The Anglo-Greek Steam Navigation and Trading Company (Limited)*. Page 399

**AFFIDAVIT OF DOCUMENTS.**

By a consent order made in an administration suit, a purchaser was to be bound by any order, as if he were a party to the suit and his contract had been the subject of it. Upon a dispute arising between the purchaser and vendors:—*Held*, that the purchaser was entitled to call on the vendors to make an affidavit of documents and to produce them. *Dent v. Dent*. 126

**AGENT.**

*See COMPANY, 3.*

*SOLICITOR AND CLIENT, 1.*

**AGREEMENT.**

*See VENDOR AND PURCHASER, 1.*

**ALLOTMENT.**

Alteration of the articles of association of a company between an application for shares and their allotment, *held* not to invalidate the allotment, such alteration being made under the authority of the "Companies Act, 1862," and the objects of the company not being thereby altered. *Re The English, &c. Rolling Stock Company. Lyon's Case*. 646

**ANCIENT LIGHTS.**

1. If the owner of one of several houses throws out a bow in the

rear, of the depth of eight feet (the whole space opposite being open), his next door neighbour cannot, on the ground of an interference with his ancient lights, prevent it. But it would be a sufficient injury, if contrary to an express covenant, to induce the Court to interfere. *Western v. Macdermot*. Page 243

2. A suit cannot be sustained in this Court for the purpose of recovering damages for an invasion of ancient lights when the injunction is refused. *Calcraft v. Thompson*. 559

3. An act of parliament alone can give any person the right of taking the property of another without his consent on payment of an adequate pecuniary compensation, and the right to light and air is as much property as the land which enjoys this easement on the land of another. *Dunball v. Wallers*. 565

**ANNUITY.**

*See CORPUS AND INCOME.*

**ANTICIPATION.**

*See REMOTENESS, 1.*

**APPOINTMENT.**

*See POWER.*

**APPORTIONMENT.**

1. Royalties payable periodically under leases granted subsequent to the Apportionment Act (1834) by a tenant for life under a power contained in a settlement prior to



that act :—*Held*, apportionable.  
*Llewellyn v. Rous.* Page 591

2. The Apportionment Act (1834) applies both to the case where the instrument creating the life interest is subsequent to that act, and also where the lease is subsequent to it. *Ibid.*

#### ARTICLES OF ASSOCIATION.

Every subscriber in a public company is bound to know the articles of association, and cannot complain of anything disclosed in them, which, if he does not know, he might and ought to know. *In re The Anglo Greek Steam Navigation &c. Trading Company (Limited).* 397

*See* ACQUIESCENCE, 2.  
PROSPECTUS.

#### ASSIGNMENT WITHOUT LICENCE.

*See* LEASE, 1.

#### ATTESTATION.

A grant of land to charitable uses was attested by one witness only, but two other persons who executed the deed were present :—*Held*, that this was not a sufficient compliance with the requirements of the Statute of Mortmain. *Wickham v. Marquess of Bath.* 59

#### ATTORNEY-GENERAL.

*See* RIGHT OF WAY, 1.

#### BANKRUPTCY.

1. A married woman became entitled to a legacy. Her husband settled

it on her and her children, reserving to himself a life estate, determinable on his bankruptcy, &c. :—*Held*, that the limitation was valid. *Montefiore v. Behrens.*

Page 95

2. Under an agreement for a lease for three years, with an option to the lessee to have an extension of the term, the option, on the bankruptcy of the lessee, passes, with the interest, to the assignees, under the 141st section of the 12 & 13 *Vict.* c. 106, and *semble* not as a power under the 147th section. *Buckland v. Papillon.* 281.
3. In 1856, the Defendant agreed with *G. F. B.* to grant him a lease of some property for three years, and, when called on by *G. F. B.*, to grant him a lease for three years, or for the whole of his, the Defendant's, term. In 1864, *G. F. B.* became bankrupt, and his assignee sold his interest to the Plaintiff, who called on the Defendant to grant the extended term :—*Held*, on demurrer, that the Plaintiff was entitled to relief. *Ibid.*

*See* ACT OF BANKRUPTCY.

FORFEITURE, 4.

NOTICE, 2.

SOLICITOR AND CLIENT, 2, 3.

#### BEQUEST.

*See* WILL and its References.

#### BOND.

Whether bonds issued by a public company, in which the names of the obligees are left in blank, are

valid, *quære*. *In re Strand Music Hall Company (Limited)*.

Page 153

### BORROWING POWERS.

The 78th clause of articles of association limited the power of the directors of borrowing to 10,000*l.*, unless authorized by a "general meeting." By the 35th clause, a "special meeting" might authorize the borrowing of such sums as it thought fit:—*Held*, that the directors might be authorized to borrow beyond 10,000*l.*, either by a general or a special meeting. *In re Strand Music Hall Company (Limited)*. 153

### BREACH OF TRUST.

*See* MORTGAGE, 1.

TRUSTEE, 4.

### BRICKFIELD.

*See* TENANT FOR LIFE AND RE-MAINDEMAN, 1.

### BUILDING LAND.

Building land was sold in a number of lots, subject to certain conditions as to fencing, repairing the roads, and to restrictions as to the class of houses to be built. The conditions also provided, that statements to this effect should be inserted in the conveyances. By the 15th condition, the vendor reserved the right of selling the unsold lots under different arrangements, "and either subject to or not subject to the stipulations as to fencing and other stipulations contained in the

particulars or the conditions:"—*Held*, first, that as to the unsold lots the vendor was subject to none of the restrictions: secondly, that the purchasers were bound to have not only the restrictive conditions stated on their conveyances, but also the 15th, in favor of the vendor: and thirdly, that a separate deed of covenant by a purchaser as to the restrictions was a sufficient compliance with the provision as to the statement on the conveyances. *Sidney v. Clarkson*. Page 118

### CALLS.

*See* RECTIFICATION OF REGISTER.

### CAPITAL.

A testator gave his real and personal estate to trustees, in trust to convert and invest, and he directed them to permit his wife to receive, "from his death, the net annual income actually produced by his trust property, howsoever constituted or invested." The testator was in partnership, the accounts of the profits of which were made up in *July* in each year, and he was entitled, at the end of each year, to be credited with interest on his capital. The testator having died in *March*,—*Held* that the widow was entitled to the whole profits of the business from the preceding *July*, but that she was only entitled to an apportioned share of the interest on the tes-

tator's capital, as from his death.  
*Ibbotson v. Elam.* Page 594

#### CAPTAIN.

*See SHIP, 2.*

#### CESTUI QUE VIE.

*See COVENANT TO RENEW.*

#### CHAMPERTY.

1. Distinction between selling a mere right to set aside a fraudulent conveyance, and selling the property itself after such a conveyance. In the first case, the purchaser cannot sue to set aside the conveyance, but in the latter he can. *Dickinson v. Burrell.* 257
2. In 1860, *A. B.* sold and conveyed some property to *C. D.* Afterwards, in 1864, *A. B.*, by a deed reciting that the deed of 1860 was invalid, voluntarily conveyed the same property to trustees for himself for life, with remainder to his children:—*Held*, that the infant children of *A. B.* could maintain a suit, as sole Plaintiffs, to set aside the deed of 1860; the right to sue being incidental to the property conveyed. *Ibid.*

#### CHARGE.

*See LAND REGISTRY.*

*MORTGAGE, 2.*

#### CHARGE ON REAL ESTATE.

A testator gave his real and personal estate to trustees upon trust out of the rents and produce, or by a sale or other disposition thereof to raise an annuity for his wife and

certain legacies, and to invest the surplus. He directed a sale of his real estate after the death of his wife, and gave his residue to his children:—*Held*, that the personal estate was not primarily charged with the annuity, but that the real and personal estate formed one common fund for its payment. *Bedford v. Bedford.* Page 584  
*See SPECIFIC LEGACY.*

#### CHARITY.

*See ATTESTATION.*

*MORTMAIN.*

#### CHARTER PARTY.

*See SHIP.*

#### CHILDREN.

*See CLASS.*

#### CHURCH OF ENGLAND SCHOOL.

*See SCHOOL.*

#### CLASS.

A testator having made gifts to the three children of his first marriage, gave his residue to his wife for life, with remainder to the five children of his second marriage (by name) "and such other child or children as should be living at the time of his death:—*Held*, on the context, that the children of the first marriage were not included in the residuary gift. *Lovejoy v. Crofter.* 149

*See SURVIVORSHIP, 1.*

#### COLLIERY.

*See MORTGAGOR AND MORTGAGEE.*

COMPANY.

1. It is not an abandonment of the objects of a company if, where, being established for three or four purposes, it abandons one and carries on the others; provided such abandonment does not alter the fundamental principle of the company. *The Norwegian Titanic Iron Company (Limited)*.

Page 223

2. A mining company, empowered to raise money, gave a security to bankers for monies due and to become due from the contractor, to whom they were indebted:—*Held*, that though the company could not guarantee the debt of a stranger, still, that the advances to the contractor might be valid if he were the agent of the company, and *semble*, that the security would be valid to the extent of the money properly expended by the contractor on the works of the company. *The Crenver, &c. Mining Company (Limited) v. Willyams*.

353

3. The power given to a company, by the 41st section of "The Companies Act, 1856" (19 & 20 Vict. c. 47), to contract for land by a person acting under its express or implied authority, is not, as regards a company formed under that act taken away by the Companies Act of 1862 (25 & 26 Vict. c. 89) although it repeals the act of 1856; for it is a "right or privilege" preserved by the 206th section. *Prince v. Prince*.

386

See ACCOUNT, 2.

ACQUIESCENCE, 2

See ALLOTMENT.

ARTICLES OF ASSOCIATION.

BOND.

BORROWING POWERS.

CONTRIBUTORY.

COSTS, 2, 5, 7.

DIRECTORS.

JURISDICTION.

LIQUIDATOR.

PROSPECTUS.

PUBLIC COMPANY.

RECTIFICATION OF REGISTER.

SHARES.

TRANSFER OF SHARES.

VENDOR'S LIEN.

WINDING UP.

COMPANIES ACT, 1862.

See WINDING-UP.

CONDITION.

1. A condition of marriage with consent: *Held*, subsequent and not precedent, and its performance having become impossible, by the act of God, was dispensed with. *Collett v. Collett*. Page 312
2. A testator gave a share of his residuary real and personal estate to his daughter, her heirs, executors, administrators and assigns, to be paid at twenty-one or on her day of marriage, provided it should take place with the consent of his widow. There was a gift over in case of her death "without having attained twenty-one years or been so married as aforesaid:"—*Held*, that the consent was a condition subsequent, and that the daughter having married without such consent (her mother being dead at

the time), had a vested interest, and that her share ought to be transferred to the trustees of her settlement, though she was still an infant. *Collett v. Collett*.

Page 312

*See* FORFEITURE.

## CONDITIONS OF SALE.

*See* BUILDING LAND.

## CONDUCT OF SUIT.

*See* INFANT, 2.

## CONSENT.

*See* CONDITION.  
PRACTICE.

## CONSIDERATION.

*See* REVERSION.

SETTING ASIDE DEED.

## CONSOLS.

*See* INVESTMENT.

## CONSTRUCTION.

*See* BORROWING POWERS.

CLASS.

COVENANT TO SETTLE.

DEED.

HOSPITAL.

LEASE, 2.

PARTNERSHIP, 1.

POWER OF SALE.

POWER TO APPOINT NEW  
TRUSTEES.

REMOTENESS.

SURVIVORSHIP, 1.

VOLUNTARY DEED.

## CONTINGENCY.

*See* CONTINGENT LEGACY.

## CONTINGENT LEGACY.

A testator bequeathed his leasehold estate to trustees, in trust, out of the rents, to pay an annuity to his daughter, and he proceeded:—

“And I hereby direct, that if my son *Henry*, now absent, shall, within five years, make his claim to my trustees, he shall be entitled to and receive one moiety of my said leasehold estate, subject however, together with the other moiety thereof in favour of my son *William*, to the annuity and trusts before mentioned.” *Henry* made no claim: — *Held*, that *William* was entitled to a moiety of the leasehold subject to the annuity, and that the gift to him was not contingent on *Henry's* claiming. *Partridge v. Foster*. (No. 2.) Page 545

## CONTRACT.

*See* SEPARATE ESTATE, 2.

VENDOR AND PURCHASER, 1.

## CONTRACTOR.

*See* COMPANY, 2.

## CONTRIBUTORY.

1. A company being in difficulties, *A. B.* gave *C. D.* 30*l.* to take a transfer of his shares, and the transfer, which stated (falsely) that *C. D.* had paid *A. B.* 25*l.* for the shares, was duly registered. About a year afterwards, the company was ordered to be wound up:—*Held*, that *A. B.* was not a contributory. *Re Hafod Lead Mining Company. Slater's Case.* 391
2. The prospectus of a company

stated, that the capital consisted of 15,000 shares of 10*l.* each; first issue 10,000 shares. *A. B.* applied for shares, which were allotted to him:—*Held*, that *A. B.* could not resist being put on the list of contributories, on the ground that less than 900 shares had ever been taken. *Re The English, &c. Rolling Stock Company. Lyon's Case.* Page 646

3. Shares were allotted to *A. B.* at a meeting of three directors, and before the number necessary to form a *quorum* had been determined:—*Held*, that *A. B.* could not, upon the Company being wound up, insist that the allotment to him was invalid. *Ibid.*

#### CONVERSION.

A testator gave his real and personal estate to trustees, in trust to raise an annuity for his widow and invest the surplus, and after her death, he directed a sale of his real estate, and declared that the produce "should be deemed to be part of his personal estate and should be subject to the disposition" of his personal estate, which he gave to his children:—*Held*, that the realty was converted into personalty only for the purposes of the will, and that the heir of the testator was entitled to so much of the real estate as had lapsed by the death of a child in the testator's lifetime. *Bedford v. Bedford.* 584

VOL. XXXV—IV.

#### COPYHOLDS.

*A. B.*, being tenant on the rolls of copyholds held in trust, devised them to *C. D.*, who disclaimed. The Court having made an order, under the Trustee Act, in the absence of the lord of the manor, vesting the copyholds in a new trustee:—*Held*, that the order was regular in form, and that it did not prejudice the right of the lord. *Paterson v. Paterson.* Page 506  
*See FINES.*

TENANT FOR LIFE AND RE-  
MAINDERMAN, 4.

#### CORPUS AND INCOME.

A testator directed his trustees to convert the residue of his real and personal estate, and to invest so much money as would produce 200*l.* a-year, and to pay it to his wife during her life. And he gave the residue, not wanted for that purpose, to other persons. The widow survived five years, and the deficiency of the income of the residue to pay her annuity amounted to nearly 700*l.*:—*Held*, that the deficiency was payable out of the *corpus*. *Percy v. Percy.* 295

#### COSTS.

1. Executors who had neglected to produce their accounts deprived of their costs of suit up to the hearing. *Gresham v. Price.* 47
2. A petition, presented by a tenant for life, for payment of the income of a fund paid into Court under

X X

the *Lancashire Canal Act*, and which fund was the subject of an administration suit, was served on the trustees:—*Held*, that the company must pay the trustees costs. *Blomster v. Clegg*. Page 124

3. The costs of a suit to take the partnership accounts are ordinarily paid out of the partnership assets. *Bonsile v. Bonsile*. 123

4. The Court sanctioned the raising of money by mortgage of an infant's estate, but after expenses had been incurred by the intended mortgagee in investigating the title, the matter went off without his default. He was allowed his costs out of the estate. *Craggs v. Gray*. 106

5. A railway company took lands belonging to a charity, and the Court authorized the investment of the purchase-money in water-works:—*Held*, that the company must pay the costs of a petition for payment out of the purchase-money. *Re Lathropp's Charity*. 297

6. Residuary legatees, served with the decree and having liberty to attend, being very numerous, the Court declined allowing them more than one set of costs of attending the taking the accounts. *Re Taylor*. *Daubney v. Leake*. 311

7. Shareholders, who appear to support or resist a petition to wind up a company, do so at their own cost, unless a personal charge is made against them; in which case, the director or member assailed is entitled to appear separately, and

to his costs from the petitioner if the case fails. *In re The Anglo-Greek Steam Navigation and Trading Company (Limited)*.

Page 399

8. Plaintiffs, though successful in their suit, held disentitled to costs by reason of unfounded charges made by them against the Defendant. *Gardner v. Emmer*. *Huntly v. Moody*. 549

#### SEE DISCLAIMER.

INFANT, 1.

PETITION.

PRE-EMPTION.

RESCINDING CONTRACT.

SALE UNDER COURT.

TENANT FOR LIFE AND REMAINDERMAN, 6.

TRUSTEE, 2.

WINDING UP, 7.

#### COVENANT.

1. *A.* conveys a plot of land to *B.* in fee, and remains owner in fee of an adjoining plot. *A.* and *B.* for themselves, their heirs and assigns, enter into reciprocal covenants against building on their respective plots:—*Held*, that whether these covenants run with the land or not, all persons claiming under *A.* and *B.* are bound by the covenants. *Western v. Macdermot*. 243
2. This Court will not interfere in the case of a mere nominal breach of covenant. *Ibid*.

See ACQUIESCENCE, 1.

BUILDING LAND.

COVENANT TO RENEW.

COVENANT TO SETTLE.

NOTICE, 3.

COVENANT TO RENEW.

Premises were demised for three lives and for twenty-one years after the death of the last survivor. The lessor covenanted with the lessee that if he should "lose a life, and think proper to have a new life put in, then, within six months after the death of the first life, and so on continuing the term and estate thereby demised," the lessor "would put in a new life:"—*Held*, that the lessee had power to introduce one new life only, and that one in the place of the first life dropping, but with a new term of twenty-one years, commencing with the death of the survivor of the two survivors and the new life. *Walmesley v. Pilkington*. Page 362

COVENANT TO SETTLE.

A marriage settlement recited an agreement that the after-acquired property of the wife should be settled, but the covenant to settle was on the part of the husband only:—*Held*, that the wife was not bound by it. *Young v. Smith*. 87

CREDITOR.

*See* ADMINISTRATION.  
WINDING-UP, 8.

CROSS-EXAMINATION.

A witness made an affidavit and died four days afterwards, and before she could be cross-examined. Her evidence was admitted at the hearing. *Davies v. Otty*. 208

DAMAGES.

*See* ANCIENT LIGHTS, 2.

DEBENTURE.

*See* BOND.  
TRUSTEE, 3.

DEBT.

*See* SATISFACTION.  
SEPARATE ESTATE, 1, 2, 3, 5.

DECREE.

*See* ADMINISTRATION.  
MORTGAGE, 3.  
PARTNERSHIP, 2.  
PLEADING.  
PRACTICE.

DEED.

1. Where they are inconsistent, the operative part of a deed prevails over the recitals; but where the operative part is ambiguous, the recitals may be resorted to to explain the ambiguity. *Young v. Smith*. Page 87
  2. The proper mode of construing any written instrument is to give effect to every part of it, if this be possible, and not to strike out or nullify one clause in a deed, unless it be impossible to reconcile it with another and more express clause in the same deed. *In re Strand Music Hall Company (Limited)*. 153
- See* COVENANT TO SETTLE.  
EVIDENCE, 3.

DELAY.

*See* LACHES.  
REVERSION, 4.  
x x 2



## DEMURRER.

A demurrer to part of the bill, unaccompanied by a plea or answer to the rest, which is put in before the expiration of the time for filing interrogatories, is irregular; but whether it would be regular if accompanied with a voluntary answer to the rest of the bill, *quære*.

*Rowe v. Tonkin*.

Page 115

See BANKRUPTCY, 3.

MULTIFARIOUSNESS.

TRANSFER OF SHARES, 2.

## DEPOSIT.

See JURISDICTION.

VOLUNTARY GIFT, 1.

## DESCRIPTION.

A person purchased a piece of land abutting on *O.* street on the east and on *T.* street on the west. He built two houses, one in *O.* street and the other in *T.* street, and he divided the property into two portions. By his will he devised "all that his freehold estate situate in *T.* street:"—*Held*, that the whole property passed. *Harman v. Gurner*.

478

## DEVISE.

1. By his will, the testator gave "all that my messuage, partly freehold and partly leasehold," in *Cannon Street*, according to the nature and tenure thereof, respectively, in trust for his widow for life, or, as to the leaseholds, for so long as the term and interest in them

should exist, with remainder over. After the date of his will, the reversion in fee of the leaseholds was purchased by, and conveyed to, the testator:—*Held*, that the fee of the whole passed under the specific gift of "my messuage" at *C.*, and that the rest of the devise was descriptive. *Miles v. Miles*.

Page 191

2. A testator gave his real and personal estate to trustees in trust, but with the consent of his widow, to sell and invest the produce and pay the income therefrom and of his estate unsold to his widow for life, and after her death, he directed that the money to be produced by his estate, "sold before her death," should be in trust for such persons as she should by deed or will appoint:—*Held*, that the widow's power did not extend over real estate not sold during her life. *Cross v. Wilks*.

562

See WILL and its References.

## DIRECTORS.

1. Where directors of a public company have entered into an informal agreement, within the limits of their power, it is in equity binding on the company, and this Court will give effect to it. *In re Strand Music Hall Company (Limited)*.
2. A large remuneration to the projector and directors of a company, if openly provided for by the articles of association, cannot afterwards be questioned by share-

153

holders. *In re The Anglo-Greek Steam Navigation and Trading Company (Limited)*. Page 399

3. Observations as to the impropriety of directors receiving gifts from the projector out of the promotion moneys received by him from the company. *Ibid.*

4. A benefit received by a director from persons employed by the company, or arising from the transactions of the company, cannot be supported. *Ibid.*

5. It is not only the duty of directors of companies to be ready, at all times, to explain everything to shareholders, but also that they shall be engaged in no transactions connected with the company from which they can derive a profit which is not openly known to, and acquiesced in, by all the shareholders. *Ibid.*

See TRANSFER OF SHARES.

#### DISCLAIMER.

The rule as to the costs of a disclaiming Defendant applies to a disclaiming heir-at-law. *Gray v. Adamson*. 383

#### DISJUNCTIVE.

By a will, the residue was given to seven persons as tenants in common for life, and on the death of the survivor was to be divided amongst their children then living *per stirpes*. By a codicil, the gift to the children was revoked, and the residue was to be divided "from and after the several deceases" of the seven,

"and after the decease of the survivor of them," amongst their children *per capita*:—*Held*, that the words "from and after," &c., were to be read disjunctively, and that, on the death of any of the seven, one-seventh was divisible amongst children of the seven *per capita*. *Cope v. Henshaw*. Page 420

#### DISSENTERS.

See SCHOOL.

#### DISSOLUTION.

See PARTNERSHIP, 1, 3, 5, 6.

#### DOMESTIC TRUST.

See FAMILY TRUST.

#### DOMICIL.

See HOSPITAL.

INSOLVENCY, 2.

#### EFFECTS.

See WILL.

#### EJUSDEM GENERIS.

See LEASE, 2.

WILL.

#### ENQUIRY.

See FORFEITURE, 2.

#### EVASION.

See MORTMAIN.

## EVIDENCE.

1. An order of course made, saving just exceptions, under the 19th Consolidated Order, rule 4, to read proceedings in bankruptcy at the hearing of the cause. *Lake v. Peisley*. Page 125
2. All that the purchaser of devised real estates can require in respect of succession duty is, distinct evidence that no claim will be made by the Inland Revenue Office for any duty on the hereditaments sold by reason of the death of the testator. If the Inland Revenue Office distinctly state this, it is sufficient, and the office cannot be compelled to give a certificate in any particular form. *Earl Howe v. Earl of Lichfield*. 370
3. Necessity of proving a deed by the attesting witness, where its validity and the payment of the consideration is contested by a person not a party to it. *Leigh v. Lloyd*. 455
4. The Court will not act on the unsupported testimony of a person in his own favor. *Down v. Ellis*. 578

See AFFIDAVIT.

CROSS-EXAMINATION.

SUBPENA.

TRUST.

## EXECUTORS.

See ACT OF PARLIAMENT.

ADMISSION OF ASSETS.

COSTS, 1.

HEIRS.

PLEA.

## FAMILY TRUST.

Bequest to widow of two-thirds of the residue, "to be at her sole and entire disposal, for the maintenance of herself and such child or children as I may leave by her:"—*Held*, that the widow had an uncontrolled power over the income so long as the children were maintained, and that the right of the children to maintenance did not cease at twenty-one. *Scott v. Key*. Page 291

## FEME COVERTE.

See HUSBAND AND WIFE and its References.

SEPARATE ESTATE.

## FINES.

Whether two fines were payable to the lord on the admission of the new trustee *quære*, but *semble* not. *Paterson v. Paterson*. 506  
See TENANT FOR LIFE AND RE-MAINDERMAN, 3, 4.

## FORECLOSURE.

See MORTGAGE, 3.

MORTGAGOR AND MORTGAGEE.

## FOREIGN LAW.

See INSOLVENCY, 2.

## FORFEITURE.

1. Devise of real and personal estate to *A.* absolutely, with a proviso that *A.*'s interest should cease if *B.* or his wife or their

children should become entitled to any part of the estate by gift, sale, &c. from *A.*:—*Held*, that the clause of forfeiture was void. *Ludlow v. Bunbury*. Page 36

2. A case of forfeiture is *strictissimi juris*, and the party alleging it must prove it at the hearing, and no inquiry will, as in ordinary cases, be directed in regard to a forfeiture. *Cox v. Bockett*. 48

3. The Plaintiff's interest was subject to a condition of forfeiture by anticipating. He gave a power of attorney to receive the income and a charge to secure a debt. There being an arrear of income at the time, and it not being shewn that the debt exceeded the arrears:—*Held*, that there was no forfeiture. *Ibid*.

4. Property was settled on *A. B.* until bankruptcy, &c. or until, by any act or default of *A. B.* or by any other ways, it should become vested in or the property of any other person. A creditor of *A. B.* obtained a judgment against him and a charge, under the 1 & 2 Vict. c. 110, s. 14, on the fund:—*Held*, that *A. B.*'s interest had thereby determined. *Montefiore v. Behrens*. 95

See BANKRUPTCY, 1.  
INSOLVENCY.

#### FRAUD.

See INFANT, 1.  
PLEADING.  
SETTING ASIDE DEED.  
SETTING ASIDE SALE.  
STATUTE OF FRAUDS.

#### GENERAL ORDERS (19 CONSOLIDATED, RULE 4).

See EVIDENCE, 1.

#### GIFT OVER.

See FORFEITURE, 1.

#### GRAVEL.

See TENANT FOR LIFE AND REMAINDERMAN, 2.

#### HEIR.

See ACCOUNT.  
DISCLAIMER.

#### HEIRS.

The word "heirs" was used seven times in a will. It was *held* to mean "executors and administrators" in three places, "next of kin" in two places, "heir at law" in one place, and trustees or executors and administrators in the last. *Powell v. Boggis*. Page 535

#### HIGHWAY.

See RIGHT OF WAY.

#### HOSPITAL.

1. *Held*, in construing a legacy "*aux hospices de Paris et de Londres*," in the will of a person domiciled in *France*, and in regard to those in *London*, that the word "*hospice*" was to be construed strictly according to its meaning in *France*, and that the word "*hospice*" in French was not equivalent to "hospital" in English. *Wallace v. Attorney-General* (No. 2). 21
2. Under a French bequest "*aux hospices de Londres*:"—*Held*, upon an

examination of French authorities, that all those institutions in *London* were included in the bequest which gratuitously received within their walls and provided for persons unable to take care of themselves, either from old age combined with poverty, infancy combined with neglect, from mental incapacity, or by reason of any bodily ailment not susceptible of cure. *Held*, consequently, that *St. George's Hospital* and the like, *Christ's Hospital* and other institutions for instruction, and the *London dispensaries*, were excluded from the benefit of the bequest. *Wallace v. Attorney-General*. Page 21

#### HUSBAND AND WIFE.

Deed by which a husband makes a provision for his wife in case of a future separation is radically defective. *Proctor v. Robinson*.

329

See BANKRUPTCY, 1.

COVENANT TO SETTLE.

JUDICIAL SEPARATION.

SEPARATE ESTATE.

SETTING ASIDE DEED.

#### INCOME AND CORPUS.

See CAPITAL.

CORPUS AND INCOME.

TENANT FOR LIFE AND RE-  
MAINDERMAN.

TIMBER.

#### INDEMNITY.

See POLICY.

TRUSTEE, 3.

#### INFANT.

1. An infant who had sold spurious articles, representing them to have been manufactured by the Plaintiff, ordered to pay the costs of suit for an injunction. *Chubb v. Griffiths*. Page 127

2. Two suits had been instituted on behalf of infants for the same purpose, and a decree had been obtained in the second. Upon motion to stay the first suit, the Court ordered it to be stayed, giving liberty to the next friend in the second to apply for the conduct of the first. *Kenyon by Jones (Next Friend) v. Kenyon*. *Kenyon by Jane Kenyon Widow (Next Friend) v. Kenyon*. 300

See COSTS, 4.

#### PRE-EMPTION.

#### INJUNCTION.

See ANCIENT LIGHTS, 1, 2.

PATENT, 2.

WINDING UP, 6.

#### INSOLVENCY.

1. The income of a fund was payable to a trader for life or until he should become insolvent. He executed a deed of inspectorship, reciting that he was unable to pay his debts in full:—*Held*, that his interest in the fund had thereby determined. *Freeman v. Brown*.

17

2. *A. B.* was adjudged insolvent under an act of the Australian legislature, which enacts, that the personal property of insolvents shall vest in their assignees by virtue of their

appointment. No assignment was executed by *A. B.* He was entitled to a share of a residue consisting of a sum of stock in the Court of Chancery in *England*. The fund was claimed by the assignees, and by the executrix of *A. B.* in *England*. *Held*, that the right to receive it depended on the domicile of *A. B.*; that if he were domiciled in *Australia*, his assignees were entitled to receive it; but if in *England* his executrix was entitled. *Re Blithman*.

Page 219

#### INSURANCE.

*See* NOTICE, 4.

#### INTEREST.

*See* PARTNERSHIP, 2  
RELEASE (PAROL).

#### INTERPLEADER.

1. Whether a sheriff can file a bill of interpleader in respect of goods which it is alleged he has wrongfully seized, *quære*. *Dalton v. Furness*. 461
2. A sheriff, who has seized goods under a *fi. fa.* issuing out of this Court, and which are claimed by a third party, cannot file a bill of interpleader until he has given notice to the judgment creditor of the adverse claims to the goods seized. *Ibid*.

#### INTERVENING.

*See* AFFIDAVIT OF DOCUMENTS.

#### INVESTMENT.

By an act of parliament, funds in Court were, by way of interim investment, to be laid out in "Navy Victualling or Exchequer Bills." But, under the 23 & 24 *Vict.* c. 38, and the General Orders of the 1st of *February*, 1861, the Court allowed them to be invested in Consols. *Ex parte The Trustees of the Birmingham Blue-coat School*.

Page 345

#### IRREGULARITY.

*See* DEMURRER.

#### ISSUE.

Motion for an issue before the evidence had been completed:—*Held*, irregular, and refused with costs. *Hamp v. Hamp*. 189  
*See* PATENT, 4.

#### JUDICIAL SEPARATION.

Husband and wife mortgaged the wife's reversionary interest in a fund. Afterwards, and before the reversion fell into possession, the wife obtained a decree for judicial separation. Upon the reversion afterwards falling in, in the husband's lifetime:—*Held*, that the mortgage did not affect it, and that the fund belonged absolutely to the wife. *In re Insole*. 92

#### JURISDICTION.

The remedy for recovering the deposit on shares is by action at law

and not by bill in equity. *Denton v. Macneil*. Page 652

### LACHES.

1. When a Plaintiff has delayed filing her bill for ten years, the time which has elapsed ought to preponderate in the Defendant's favor, where the evidence is conflicting, and the balance of it is even. *Hardwick v. Wright*. 133
2. A delay of nine years in seeking to set aside a deed:—*Held*, under the circumstances, accounted for. *Proctor v. Robisson*. 329  
See REVERSION, 4.

### LANDLORD AND TENANT.

See LEASE, 2.

### LAND REGISTRY.

- A. B.*, the owner of seven lots of land, sold two of them to *C. D.*, and he retained five. They entered into mutual covenants for bearing, in proportion, the expenses of a road common to all the lots, and there was a proviso that the expenses should be a charge upon the owners of the seven lots in proportion. *Held*, that the land was not charged, and that *A. B.* was entitled to have an indefeasible title to his five lots registered under the 25 & 26 *Vict.* c. 53, without noticing the proviso or the claims of *C. D.* *In re Drew. Ex parte Mason*. 443

### LANDS CLAUSES ACT.

The 80th section of the 8 *Vict.* c. 13 (The Lands Clauses Consolidation Act), is to be construed liberally. *Re Lathropp's Charity*. Page 297  
See COSTS, 2, 5.

### LAPSE.

1. Gift of residue to widow for life, and afterwards to fifteen designated persons, "or their executors, administrators or assigns," and "to be absolutely vested" on the testator's death, and to be payable at twenty-one, provided the widow had died:—*Held*, that the shares of two of the fifteen, who predeceased the testator, had lapsed. *Leach v. Leach*. 185
2. A testator bequeathed a fund to his nephew *A.* and the children of his late sister *B.*, as tenants in common; but, in case any died before the testator leaving issue, his share was not to "lapse," but go to his executors as part of his personal estate. Three of the children of *B.* died before the testator and left no issue:—*Held*, that there was no lapse, but that the whole went to the other members of the class. *Aspinall v. Duckworth*. 307

### LEASE.

1. A proviso that a lessee shall not assign without the consent or the licence of the lessor, is not an usual covenant, and is not implied by the words, "the lease to con-

tain all the usual covenants for protecting the interest of the lessor."

*Buckland v. Papillon.* Page 281

2. A landlord was empowered to resume possession of any part of the land demised, in case it should be required by him "for the purpose of building, planting, accommodation or otherwise:"—*Held*, that this did not entitle the landlord to resume possession of land required by a railway company, so as to defeat the tenant's right to compensation:—*Held*, also, that the word "otherwise" was to be read as being *ejusdem generis*. *Johnson v. The Edgware, &c. Railway Company and Others.* 480

See BANKRUPTCY, 2, 3.

COVENANT TO RENEW.

MERGER.

NOTICE, 3.

RENEWAL.

## LEGACY.

See WILL and its References.

## LEGACY DUTY.

A testator devised real estate to trustees in trust by sale or mortgage to raise 20,000*l.*, and subject thereto he devised the estate to his son. The trustees sold part of the estate, but, before the contract had been completed, the trustees were paid, and the estate was conveyed to the son, who adopted the contract:—*Held*, that legacy and not succession duty was payable on the purchase-

money. *Earl Howe v. Earl of Lichfield.* Page 370

See SUCCESSION DUTY.

## LEGAL ESTATE.

See MORTGAGE, 1.

## LESSOR AND LESSEE.

See LEASE and its References.

## LICENCE.

See LEASE, 1.

## LIEN.

In a suit by an unpaid vendor, the Court decreed a specific performance, and the payment of the purchase-money and damages. The purchasers were unable to pay, and the property was in the possession of a Receiver in another suit instituted by persons claiming charges under the purchasers. A petition by the vendor served upon the purchaser and the Plaintiffs in the other suit to enforce his lien and obtain a sale of the property, was dismissed with costs, the proper remedy being by bill. *The Attorney-General, on behalf of Her Majesty v. The Sittingbourne, &c. Railway Company.* 268

See MARSHALLING.

VENDOR'S LIEN.

## LIQUIDATOR.

An order for the appointment of an Official Liquidator, obtained *ex parte* before an order to wind up



the company had been made, discharged. *Re The Railway Finance Company (Limited)*. Page 473  
See WINDING-UP, 14.

#### MAINTENANCE.

See CHAMPERTY.

#### MARRIAGE.

See CONDITION, 1.

#### MARSHALLING.

Pecuniary legatees are entitled, as against the devisees (under the doctrine of marshalling assets), to stand in the place of an unpaid vendor whose lien has exhausted the personal assets. *Lord Lilford v. Powys Keck* (No. 3). 77

#### MERGER.

*A. B.*, being owner of a leasehold, purchased the reversion in fee and had it conveyed to a trustee expressly that the term might not merge. He afterwards bequeathed to his wife "the whole of his personal property, estate and effects of every and whatsoever kind they might be:—*Held*, first, that the real estate did not pass; and, secondly, that the term did not attend the inheritance, but passed to the widow. *Belaney v. Belaney*. 469

#### MISCALCULATION.

A testator by his will bequeathed 500*l.* to his widow, and by a codicil he bequeathed her "a further

sum not exceeding 300*l.*, making altogether a legacy of 1,000*l.* given to her by my will and this codicil:—*Held*, that there was a mere miscalculation and that under the codicil, the widow was only entitled to 300*l.* *Morgan v. Middlemiss*. Page 278

#### "MONEY."

A testator gave a house and 300*l.* "of lawful money" to his daughter, and "the remainder of all his moneys, in whatever it may be, in bonds or consols or anything else," to his wife:—*Held*, that the wife was entitled to all the testator's residuary personal estate invested in any security, including a life policy, but not to a leasehold or furniture or chattels. *Stooke v. Stooke*. 396

#### MORTGAGE.

1. *A. B.*, in whom a lease was vested, deposited it with his bankers by way of equitable mortgage. The bankers afterwards received notice (as the fact was) that *A. B.* was a mere trustee of the leasehold, but they subsequently obtained from him a formal mortgage of the legal estate:—*Held*, that the *cestuis que trust* had priority over the bankers. *Baillie v. M'Kewan*. 177
2. A tenant for life of a real estate bequeathed all money due to him on mortgage:—*Held*, that a charge on the estate of 10,000*l.*, to which the testator was entitled and which was secured by means of a term vested in a trustee, did not pass

as a mortgage. *Earl Poulett v. Hood.* Page 234

3. The Court, in making a foreclosure decree, gave liberty to any party to apply in Chambers for a sale. *Burmester v. Moxon.* 310

4. *A.* mortgaged some property to *B.* by deposit of deeds, with a written engagement to execute a mortgage when called on. *A.* next sold and conveyed the legal estate to *C.*, subject to the mortgage. Afterwards *A.* executed the mortgage to *B.* This contained a power of sale, under which *B.* sold the property to the Plaintiff:—*Held*, that *C.* was bound by the power of sale and the sale, and that he was a trustee for the purchaser. *Leigh v. Lloyd.* 455  
See PLEADING.

RELEASE (PAROL).

REVERSION, 5, 6.

SOLICITOR AND CLIENT, 1.

#### MORTGAGOR AND MORTGAGEE.

1. As to the rights and remedies of a mortgagee of a share in a colliery partnership. *Redmayne v. Foster.* 529
2. The mortgagee of a share in a colliery partnership is entitled to a decree for foreclosure, but he is not entitled to any account of the property paid or distributed to shareholders or partners before he filed his bill, nor is he entitled to contest or call the shareholders to account for their previous management of the colliery, but he is entitled to say, that no extra burden

shall be thrown on his shares which is not in accordance with some contract or agreement in force at the date of the mortgage. *Redmayne v. Foster.* Page 529  
See COSTS, 4.

#### MORTGAGE.

#### MORTMAIN.

A man granted to his sister a lease of lands at a peppercorn rent for twenty years, determinable at their deaths. Three months afterwards he granted the hereditaments to charitable uses, subject to the lease:—*Held*, that this gift to charity was an evasion of the Statute of Mortmain and void. *Wickham v. The Marquess of Bath.* 59  
See ATTESTATION.

#### MOTION.

See ISSUE.

#### MULTIFARIOUSNESS.

A bill by one of the next of kin to administer the estate and to set aside a conveyance by him of part of it is multifarious. *Bouck v. Bouck.* 643

#### NEXT FRIEND.

See INFANT, 2.

#### NOTICE.

1. Parol notice given to a trustee of an incumbrance on the trust fund is sufficient; but a statement to a trustee, in a casual conversation, is insufficient notice to him. *Re Tichener.* 317
2. A mortgagee of a trust fund gave

no notice to the trustee until after the mortgagor's bankruptcy; but he gave notice before the assignees had given notice to the trustee of their right:—*Held*, that the trust fund was in the order and disposition of the bankrupt and belonged to the assignees. *Re Tichener*.

Page 317

3. The assignee of an underlease held to have constructive notice of a covenant in restraint of trade contained in an assignment of the original lease, he having precluded himself, by agreement, from examining the prior title. *Clements v. Welles*. 513
4. By a rule of a mutual assurance society, the insured was bound to give notice to the directors of any change of the captain of his vessel, and, in case of default, the society was not to be liable for any subsequent loss. By another rule, notices to members sent by post were to be effectual, though not actually received:—*Held*, that the directors of the society were members within the latter rule, and that a notice of a change of captain sent to them by post was valid, though not actually received by them. *Branford v. Howard*. 613

See ARTICLES OF ASSOCIATION.

WINDING UP, 5.

#### OPTION.

See BANKRUPTCY, 2.

RENEWAL.

#### ORDER.

See COPYHOLDS.

#### ORDER AND DISPOSITION.

See NOTICE, 2.

#### PARCELS.

See DEVISE.

#### PARENTS.

See SUBSTITUTION, 1.

#### PARISH.

See RIGHT OF WAY.

#### PARTICULARS.

See PATENT, 1.

#### PARTIES SERVED.

See COSTS, 6.

#### PARTNERSHIP.

1. By partnership articles, one of three partners might "determine the co-partnership by giving six calendar months' notice:" and in that case, immediately after the expiration of the six calendar months, the assets were to be valued, and after the valuation being made and the result communicated, the partnership "shall, in regard to all the said partners, cease and determine:"—*Held*, that the partnership was dissolved at the expiration of the six months, and not from the completion of the valuation, though it continued after the six months, for the purpose of winding it up. *Griffiths v. Bracewell*. *Bracewell v. Griffiths*.

Page 43

2. Under the common decree in a

partnership suit, interest is payable, on the balance found due from one partner to another, from the date of the certificate. *Bonville v. Bonville.* Page 129

3. *A. B.* having been rendered incapable of performing his partnership duties, his partner filed a bill against him for a dissolution. Afterwards and before the hearing, *A. B.*'s health improved:—*Held*, that there was not sufficient ground for dissolving the partnership, and all proceedings were stayed, with liberty to apply. *Whitwell v. Arthur.* 140

4. By articles of partnership for a term between *A.* and *B.*, all bills were to be signed by *A.* only. *B.* drew a bill on a customer for the amount of his bill:—*Held*, that this was not a substantial violation of the articles. *Cheesman v. Price.* *Price v. Cheesman.* 142

5. The failure of one partner to enter in his accounts partnership moneys received by him is, of itself and independent of any provisions in the articles of partnership, a sufficient ground for the other partner dissolving. *Ibid.*

6. By articles of partnership for a term, each partner was to keep proper books of account and to enter all his receipts, and in default the other might dissolve the partnership. One partner had made small omissions in seventeen instances, which, in the aggregate, amounted to 9*l.* 10*s.*:—*Held*, that this justified the other in dissolving the partnership. *Ibid.*

*See Costs*, 3.

## PATENT.

1. A patentee is not entitled, after replication, to an order, under 15 & 16 *Vict.* c. 85, s. 41, for the delivery of particulars of the objections to the patent which the Defendant intends to rely on. *Bovill v. Goodier.* Page 264

2. The distinction in equity is, that where the validity of a patent has not been the subject of any legal proceedings, the patentee must prove its validity at law, before the Court of Equity will protect him; but having once established its validity, then the Court of Equity will protect him against any other person until that person proves its invalidity. *Bovill v. Goodier.* 427

3. A patentee established the validity of his patent in an action against *A. B.*:—*Held*, in a subsequent suit by the patentee against *C. D.*, that *C. D.* was not concluded by the proceedings at law, to which he was not a party, and that he was not to be driven to contest the validity of the patent by *scire facias.* *Ibid.*

4. After a patentee had established his patent as against one person at law, he instituted proceedings for an infringement against another in equity. The Court granted the Defendant an issue as to the novelty of the invention, but refused it as to the utility of the invention and the sufficiency of the specification, holding that the utility was not contested or had been proved in the suit, and that the sufficiency of the specification

## INDEX TO THE PRINCIPAL MATTERS.

THE NEW MINE, described in the  
return in No. 1, and in which  
the Court, in No. 1, was asked  
if any new proceeding in the  
matter of the new mine, described  
in No. 1, was proper. Page 417

### PERSONAL REPRESENTATION.

#### TESTATE.

See ADJUDICATION OF ASSETS.

#### INTER VIVOS.

Partnership represented in the return  
and in the bill. On the  
application of the respondents,  
there was given in the return,  
and the respondents were ordered  
to pay the costs of the application.  
In the *Anglo-Siam Steam Navigation  
Company v. The Siam Company*  
(No. 2). Page 413  
See LISTS.

#### PLEA.

In a bill for the administration of  
real and personal estate, and for  
the appointment of a receiver and  
a new trustee, a plea in bar, by  
the alleged executor, that they  
had been prevented paying by  
the Plaintiff's entering a caveat in  
the Court of Probate, was over-  
ruled. *Tempest v. Lord Camoys*.  
201

### PLEADING.

A bill prayed that a mortgage might  
be cancelled and for further relief,  
but it proved to be valid to some  
extent. The Court refused the  
relief asked, or to make a decree  
for redemption on payment of  
what was properly due, and dis-

missed the bill with costs. *The  
Cresser, &c. Mining Company  
Limited, v. Williams*. Page 353  
See ABATIMENT.

#### ACCOUNT.

#### CERTIFICATES.

#### DECEASED.

#### LIFE.

#### MULTIPLICITY.

#### PLEA.

#### REVIVOR.

### POLICY.

Where the title to a lost policy is  
clear, the insurance company is  
entitled to no indemnity where  
they pay the money into Court.  
*England v. Lord Tredegar*. 256  
See MONEY.

### POSSESSION.

A mortgagee out of possession called  
on the tenant for his rent, who  
said he had laid it out in repairs.  
The mortgagee acquiesced in this;  
but there was no evidence of the  
tenant's accepting the mortgagee  
as his landlord or of anything like  
an attornment:—*Held*, that there  
was not an entering into possession  
or into the receipt of the rent by  
the mortgagee. *Ward v. Carttar*.  
171

### POWER.

1. A testatrix bequeathed "all moneys  
belonging to her in the £3 per  
Cent. Consols" to two children  
and her son's widow. The only  
consols she was interested in were  
settled on her for life, with power  
to appoint amongst her children.  
*Held*, that the will operated as an

execution of the power as regarded the two-thirds to the two children, although it contained no other reference to the power or to the subject of it. *In re Gratmick's Settlement.* Page 215

2. By a will, dated in 1858, the testator purported to execute all powers. By a subsequent settlement, he settled his property, reserving to himself a power of appointment by his "last will." He afterwards made another will, which he termed his "last will," and he thereby only partially executed the power:—*Held*, that the first will of 1858, though unrevoked, was, in no way, an execution of the power. *Pettinger v. Ambler.* 321

See POWER OF SALE.

POWER TO APPOINT NEW TRUSTEES.

SEPARATE ESTATE, 3.

### POWER OF SALE.

A marriage settlement of personalty empowered the trustees to sell it, and invest the produce in real estate. The estate was to be held on corresponding trusts and to be considered personal estate. There was an express power to sell the securities to be purchased, and to re-invest the produce, from time to time, but no express power to sell the purchased estate. The trustees invested the fund in a real estate:—*Held*, that they had a power of sale over it, and could give good receipts for the purchase-money. *Tait v. Lathbury.* 112  
See MORTGAGE, 4.

VOL. XXXV—IV.

### POWER TO APPOINT NEW TRUSTEES.

Under a power to the survivor to appoint new trustees, the Court *held*, upon the terms of the power, that surviving trustees, appointed by the Court and not under the power, had no authority to exercise it. *Cooper v. Macdonald.*

Page 504

### PRACTICE.

Upon a motion for an injunction, the Defendant consented to an immediate decree, but he became bankrupt before the decree had been drawn up, and his written consent to set down the cause could not be obtained. The Court made the order for setting down the cause and dispensed with the consent. *Brighthouse v. Margelson.*

303

See ABATEMENT.

ADMISSION OF ASSETS.

AFFIDAVIT.

AFFIDAVIT OF DOCUMENTS.

COPYHOLDS.

COSTS.

CROSS-EXAMINATION.

DISCLAIMER.

EVIDENCE, 1, 3.

FORFEITURE, 2.

INFANT, 2.

INVESTMENT.

ISSUE.

PETITION.

REVIVOR.

SALE UNDER COURT.

SUBPENA.

### PRECATORY TRUST.

Bequest of the principal and interest of one-third of the residue to a

Y Y

widow "being well assured that she will husband the means that may be left to her by me with every prudence and care, for the sake of herself and children."—*Held*, that this created no precatory trust, and that the widow took absolutely.

*Scott v. Kepp*. Page 291

#### PRE-EMPTION.

A testator had granted to the Plaintiff the right of pre-emption of an estate which he had previously devised to an infant. The Plaintiff exercised his option after the testator's death and filed his bill against the infant and executor for specific performance. The Court gave no costs against the Defendants. *Hale v. Bushell* 343

#### PRESUMPTION.

*See RIGHT OF WAY*, 2.

#### PRINCIPAL AND SURETY.

As between principal and surety, if the primary security prove worthless, whether it was so originally or whether it becomes so afterwards, the surety is not discharged, unless the loss or deficiency of the original and primary security was occasioned by the act of the creditor. *Hardwick v. Wright*. 133

*See ACT OF BANKRUPTCY*.

#### PRIORITY.

*See MORTGAGE*, 1.

*NOTICE*, 2.

*SEPARATE ESTATE*, 5.

#### PRODUCTION OF DOCUMENTS.

*See WINDING-UP*, 8.

#### PROMISSORY NOTE.

*See SEPARATE ESTATE*, 1.

*VOLUNTARY GIFT*, 1.

#### PROSPECTUS.

Though the articles of association of a company materially extend the objects of the company beyond those stated in the prospectus, still, if the prospectus refers to the articles, a person taking shares upon the faith of the prospectus is bound by the articles, unless they are wholly incompatible with the prospectus. *Re The Hop and Malt Exchange and Warehouse Company (Limited)*. *Briggs' Case*.

Page 273

*See ACQUIESCENCE*, 2.

*PUBLIC COMPANY*.

#### PUBLIC COMPANY.

Prospectuses of a company are always colored, but if a material fact is stated in them which is untrue, and upon the faith of which a person takes shares, he is entitled, as against the company, to require allotment of those shares to be cancelled and his deposit repaid. *Denton v. Macneil*. 652

*See ACQUIESCENCE*, 2.

#### ALLOTMENT.

#### BOND.

*COMPANY and its references*.

#### DIRECTORS.

#### RECTIFICATION OF REGISTER.

#### TRANSFER OF SHARES.

#### VENDORS' LIEN.

#### WINDING-UP.

RAILWAY.

See COMPANY.

COSTS, 5.

REAL AND PERSONAL  
ESTATE.

See CHARGE ON REAL ESTATE.  
CONVERSION.

RECITAL.

By her will, the testatrix gave 1,000*l.* amongst the children of her niece. By a codicil, she recited that she had, by her will, given 1,000*l.* to *F. B.* (a son of her niece), and she declared that the said legacy should not be payable until twenty-one, with power of maintenance. *Held*, that the erroneous recital constituted no gift, and that *F. B.* was only entitled to a share of the 1,000*l.* *Mackenzie v. Bradbury.*

Page 617

See DEED, 1.

RECTIFICATION OF  
REGISTER.

Where an action is brought for calls, and in which the question whether the Defendant is or not a shareholder will be determined, this Court, on an application by such Defendant to correct the register, by omitting his name, will postpone its decision until the result of the action is known. *The Alexandra Hall Company. Roebuck's Case.*

467

RELEASE (PAROL).

*A. B.*, to whom his son-in-law had, by deed, mortgaged some property,

declined to receive the interest, and afterwards, to induce his son-in-law to reside on the mortgaged property, *A. B.* had promised to allow him to live there rent-free. The son-in-law acted on the promise until *A. B.*'s death:—*Held*, that, in equity, no interest was payable until that time. *Yeomans v. Williams.*

Page 131

REMOTENESS.

1. Where a bequest is made to persons *in esse* for life, with remainder to their unborn children, with a general direction that the female children shall take for their "separate and inalienable use," such restriction against alienation is too remote and void. *Semble. Armitage v. Coates.* 1
2. Under several bequests to living persons for life, with remainder to their children born and unborn, with a general proviso that the shares of females shall be for their separate inalienable use:—*Held*, that the restriction against anticipation applied only to the tenants for life, in consequence of a direction for payment to the children and a proviso that their receipts should be good discharges. *Ibid.* See SURVIVORSHIP, 3.

RENEWAL.

*A.* agreed to let some premises to *B.* for three years, and, at the expiration of that term, to grant him a lease for an extended term. *A.* died, and, three years having expired, *B.* continued to hold on



## INDEX TO THE PRINCIPAL MATTERS.

under a mortgage for years without making for a sale. The law required a sale. *Held*, that it was not an interference, and that he was entitled to the extension of the term. *Moss v. Burton*. Page 197

See *Harbottle*, 2, 2.

## REPLETION.

See *Specific Performance*,  
*Vendor and Purchaser*, 1.

## RESCINDING CONTRACT.

A person for specific performance was made against a purchaser in possession, but he was unable to complete the purchase. The Court rescinded the contract and ordered the purchaser to pay in the interim the rents received by him, together with the costs of suit and those incurred by the non-completion of the purchase. *Clark v. Wallis*. 411

## RESCUE.

See *Milner*,  
*Specific Liability*.

## RETTAINER.

See *Parsons*, 2.

## REVERSION.

1. In a suit to set aside a sale by private contract of a reversion:—*Held*, that the highest price bid for it upon a previous attempt to sell it by auction was a fair test of its market value. *Lord v. Jeffkins*. 7

2. As to the difficulty in ascertaining the value of a reversion which is contingent on the death of a lady without issue. Whether such "issue takes" can now be insured against, *infra*. *Lord v. Jeffkins*. Page 7

1. In ascertaining the market value of a reversion, the fact of its being the subject of a chancery suit, even though it does not affect the right to it, must be taken into consideration. *Ibid*.

A. Long delay in filing a bill to set aside the sale of a reversion is not to be disregarded. *Ibid*.

2. A mortgage of a reversionary interest stands in the same position as a sale, and therefore to support the transaction the mortgagee must show that he gave full value. *Bowman v. Fitch*. 570

1. A mortgage of a reversionary interest, depending on a gentleman dying without issue male, set aside for inadequacy of consideration, although the risk was such as not to be susceptible of accurate valuation. *Ibid*.

2. Loans were made to a young man on his bills at exorbitant interest, and when they were about to become due, he mortgaged his reversionary interest to secure the amount and a further advance. The mortgage being set aside for inadequacy, *held* that the mortgagee was entitled to the full amount of the bills and not simply to the money actually advanced on them. *Ibid*.

8. On setting aside the sale of a reversion for inadequacy after four years, the purchaser is not entitled to any allowance for the risk he has run in the meantime. *Benyon v. Fitch.* Page 570
9. On setting aside the purchase of a reversion for inadequacy, the deed stands as a security for the money actually due, and if it be not paid, the bill stands dismissed, which is equivalent to a foreclosure. *Ibid.*

#### REVERSIONARY INTEREST.

*See* JUDICIAL SEPARATION.

REVERSION.

#### REVIVOR.

1. A sole Plaintiff having died after decree, an order to revive against his devisee was made, under the 15 & 16 *Vict.* c. 86, s. 52. *Bedford v. Bedford.* 342
2. A Defendant having died before answer, an order to revive and also to answer was made against his personal representative under the 15 & 16 *Vict.* c. 86, s. 52. *Trench v. Semple.* 376
3. An order to revive, under the 15 & 16 *Vict.* c. 86, s. 52, cannot be obtained against executors who have not proved the will, though it is alleged they have acted. *Joyce v. Rawlins.* 465
4. After decree, a suit became defective by the transfer of the Plaintiff's interest. The Plaintiff and his transferees having, after notice, neglected to revive, an order was made, on the application of the

Defendants, for an order to revive, and that they might carry on the suit. *Overman v. Overman.*

Page 477

*See* ABATEMENT.

#### REVOCATION.

*See* POWER, 2.

#### RIGHT HEIRS.

A share of the produce of real and personal estate directed to be sold was given to a *feme sole* for her life, "and after her decease to her heirs, as she shall give it by will, and if she die without leaving a will, to her *right heirs* for ever." *Held*, that "right heirs" was to be construed "executors and administrators." *Powell v. Boggis.*

535

#### RIGHT OF WAY.

1. A vestry was empowered, by act of parliament, to indict any person who should stop or impede rights of way in the parish, and to take such other proceedings for opening thereof as should appear expedient. *Held*, that the vestry must indict in the name of the Queen, and sue in equity in the name of the Attorney-General, and that they could not proceed in their own name. *The Vestry of the Parish of Bermondsey v. Brown.* 226
2. A dedication to a parish of a right of way cannot be presumed; a dedication can only be presumed, from uninterrupted use, in favor of the public generally, and not in

Issue of a portion of the profits, as  
of the management of a journal.  
*The Editors of the Papers of Her-  
mann v. Lovers.* Page 221

### SALE UNDER COURT.

Where, upon a sale under the Court,  
the title turned out bad:—*Held*,  
that the purchaser, on being dis-  
charged, was not entitled to his  
costs as against a Defendant to  
whom the conduct of the sale had  
been committed by the Court.  
But his rights as against any fund  
which might come into Court, were  
reserved. *Mullins v. Huxary.*

301

### SATISFACTION.

A debt held not satisfied *pro tanto*  
by a legacy of a less amount be-  
queathed by the debtor to the  
creditor. *Gos v. Laddell* (No. 1.)

621

### SCHOOL.

Authority given by the Court to  
apply to parliament to authorize a  
scheme admitting the children of  
Dissenters to the benefit of a  
Church of England school. And,  
upon application to parliament,  
such authority was granted. *The  
Attorney-General v. The Market-  
Bosworth School.*

305

### SCIRE FACIAS.

See PATENT, 3.

### SEPARATE ESTATE.

1. Property was settled on a *feme  
sole* for her separate use for  
life, with a power to appoint it by  
deed or will. She executed the  
power by will:—*Held*, that the  
appointed property was not liable  
to pay a promissory note signed  
by her. *Shattock v. Shattock.*

Page 489

2. A married woman cannot bind  
herself by contract, but Equity  
holds that she may, by contract,  
bind her separate estate. Her  
separate estate will be liable to  
pay any debt of hers which she  
has secured by writing. Equity  
has also *held*, that it is sufficient  
if it be shown that the married  
woman verbally promised that her  
debt should be paid out of her  
separate estate. *Ibid.*

3. The separate property of a mar-  
ried woman is not, after her death,  
liable to pay her general debts  
either in the case of her having  
been absolutely entitled to the  
property, or of her having only a  
life estate with a power to dispose  
of it by deed or will. *Ibid.*

4. The principle of Courts of Equity  
is, that, as regards her separate  
estate, a married woman is a *feme  
sole*, and can act as such; but this  
is only so far as is consistent with  
the other principle, viz., that a  
married woman cannot enter into  
a contract. *Ibid.*

5. In the administration of the sepa-  
rate estate of a married woman  
after her decease, the debts are to  
be paid in order of priority and

not *pari passu*. *Shatlock v. Shatlock*.  
Page 489

SERVANT.

See WINDING-UP, 5.

SET-OFF.

See STATUTE OF LIMITATIONS, 2.

SETTING ASIDE DEED.

Deed between husband and wife improperly obtained from the husband, through the wife's solicitor, who took a benefit under it, set aside, with costs, to be paid by such solicitor. *Proctor v. Robinson*.  
329

SETTING ASIDE SALE.

Sale, by an old woman of eighty-eight, of an estate in possession for one-fourth its value set aside, she being in distress and without legal assistance, and being also under the impression that she could not make out a good title, while the purchaser, knowing that she could, concealed the fact from her. *Summers v. Griffiths*. 27

SETTLEMENT.

See BANKRUPTCY, 1.

POWER OF SALE.

SURVIVORSHIP, 2.

SHAREHOLDER.

See ACQUIESCENCE, 2.

SHARES.

Distinction between a transfer of shares which is fraudulent and void as against the transferee, and one which is so as regards the company. *Re Haford Lead Mining Company*. Page 391

See ALLOTMENT.

TRANSFER OF SHARES.

SHERIFF.

See INTERPLEADER.

SHIP.

1. This Court cannot decree the specific performance of a charter-party, but it can restrain the parties from employing the ship in a manner inconsistent with the rights under a charter-party. *Le Blanch v. Granger*. 187
2. Whether, when the ship and owner are both in this country, the captain can, without the special authority of the owner, charter the ship, *quære?* *Ibid*.  
See NOTICE, 4.

SOLICITOR AND CLIENT.

1. A solicitor paying off a mortgage on his client's estate is considered as acting as his agent. *Ward v. Cartlar*. 171
2. *A. B.* was a partner in a mercantile firm, and was also a partner in a firm of solicitors. The mercantile firm alone were made bank-

rupt. *Held*, that their assignees were not entitled to the delivery to them, by the firm of solicitors, of the papers of the mercantile firm, until their lien on them had been satisfied. *In re Moss*. Page 526.

3. A solicitor was also a partner in a mercantile firm, which became bankrupt. *Held*, that the bankruptcy of the mercantile firm operated as a discharge of the solicitors' clients, so as to entitle them to the delivery of their papers, upon terms, before the satisfaction of the lien. *Ibid*.

4. Transactions between solicitor and client, by which the former obtained gifts, and an undue advantage, set aside and the securities ordered to stand good only to the extent of what might be found justly due to the solicitor. *Gardener v. Ennor*. *Humby v. Moody*.

549

5. Though this Court holds that it is highly improper for a solicitor to derive a personal advantage in the shape of gifts from his clients, or in the shape of the liquidation of his bills untaxed and undelivered, still the Court cannot approve of clients entering into transactions with their solicitor, whereby they obtain from him present relief, and at the same time indulge the expectation that the Court will afterwards, at their instance, annul the whole transaction on the ground of the relation subsisting between them. *Ibid*.

*See SETTING ASIDE DEED.*

TAXATION.

## SPECIFICATION.

*See PATENT*, 4.

## SPECIFIC LEGACY.

A testatrix, by her will, bequeathed both general and specific legacies, and she willed that, in case of her personal estate proving insufficient for the payment of her legacies, then the deficiency should be made up out of her real estate. By a codicil, she gave "all my personal estate to *A. C. M.*" *Held*, that *A. C. M.* took the whole personal estate discharged of the legacies; and secondly, that the general legacies still remained charged on the real estate, but that the specific legacies did not, and therefore failed. *Kermode v. Macdonald*.

Page 607

## SPECIFIC PERFORMANCE.

The Plaintiff agreed to grant to the Defendant a lease for twenty-one years, with a right to re-let; but he had only a term of twenty years, and could not underlet without the consent of his landlord. The Defendant repudiated the contract. The Plaintiff afterwards filed his bill for specific performance, and, pending the suit, the landlord agreed to concur:—*Held*, that the contract could not be enforced, and the bill was dismissed with costs. *Forrer v. Nash*.

167

*See PRE-EMPTION.*

SHIP, 1.

STATUTE OF FRAUDS.

The Plaintiff apprehensive of being indicted for bigamy (which it turned out he was not liable to) conveyed real property to the Defendant on a parol agreement to re-transfer when the difficulty had passed. On a bill for a re-transfer, the Defendant denied the agreement and insisted on the Statute of Frauds, the trust not being in writing. *Held*, that this was a case of fraud and that the statute did not apply. *Davies v. Otty*. (No. 2.) Page 208

STATUTE OF LIMITATIONS.

1. In an administration suit, the administratrix and all the persons interested (except one who was not before the Court) declined to object that some of the debts which were claimed were barred by the Statute of Limitations. The Court, on the administratrix taking the risk, ordered payment of such debts. *Alston v. Trollope*. 466
2. The testator held 2,000*l.* belonging to his nephew, on which for eight years he paid interest, notwithstanding the nephew owed him 1,000*l.* on his promissory note. Though the nephew had paid no interest on the note, and had given no acknowledgment of the debt: — *Held*, that although the remedy for recovering the 1,000*l.* was barred by the Statute of Limitations, still the right of the executors to set it off against the 2,000*l.*

remained. *Gee v. Liddell*. (No. 2.) Page 629

See POSSESSION.

1

STATUTES.

27 *Eliz. c. 5.*

See VOLUNTARY SETTLEMENT, 2.

9 *Geo. 2, c. 36.*

See ATTESTATION.

MORTMAIN.

3 & 4 *Will. 4, c. 27, s. 28.*

See POSSESSION.

4 & 5 *Will. 4, c. 22.*

See APPORTIONMENT.

1 & 2 *Vict. c. 73.*

See TAXATION.

8 *Vict. c. 18.*

See LANDS CLAUSES ACT.

8 & 9 *Vict. c. 18, s. 89.*

See COSTS, 2, 5.

12 & 13 *Vict. c. 106.*

See BANKRUPTCY, 2.

15 & 16 *Vict. c. 85, s. 41.*

See PATENT, 1.

15 & 16 *Vict. c. 86, s. 52.*

See ABATEMENT.

REVIVOR.

19 & 20 *Vict. c. 47.*

See COMPANY, 3.

20 & 21 *Vict. c. 85, s. 25.*

See JUDICIAL SEPARATION.

21 & 22 *Vict. c. 108.*

See JUDICIAL SEPARATION.

23 & 24 *Vict. c. 145, s. 27.*

See TRUSTEE, 1.

STATUTES—*continued*.

25 &amp; 26 Vict. c. 53.

*See* LAND REGISTRY.

25 &amp; 26 Vict. c. 89.

*See* COMPANY, 3.

25 &amp; 26 Vict. c. 89, s. 100.

*See* WINDING-UP, 1.

25 &amp; 26 Vict. c. 89, ss. 79, 80.

*See* WINDING-UP, 2, 3, 10, 11, 12, 14, 15.

25 &amp; 26 Vict. c. 89, s. 87.

*See* WINDING-UP, 9.

## SUBPŒNA.

Upon a motion for a decree, a *subpœna duces tecum* to produce a document at the hearing does not issue as of course. *Chard v. Cox*.  
Page 191

## SUBSTITUTION.

1. Under a gift to parents, with a gift, by substitution, to their children in the event of such parents dying leaving issue:—*Held*, that to entitle the children, the event must happen prior to the period of distribution. *Wood v. Wood*. 587
2. A testator directed his real estate to be sold on the death of his widow, and the produce paid to his six "children and the issue of such of them as should die leaving issue," equally, "the issue of such children being respectively entitled amongst them to such share only as their parents would have been entitled to if living." The will contained a gift over, in case of any of the children dying in the

testator's "lifetime or after his decease" without leaving a child:—*Held*, that a child who survived the widow became absolutely entitled and that her children took nothing. *Wood v. Wood*. Page 587

## SUCCESSION DUTY.

- A tenant for life directed his executors to pay, out of a particular fund, his pecuniary legacies and annuities, "and the legacy and succession duty payable for the same or in consequence of his death":—*Held*, that the succession duty payable by the next remainderman, under a prior settlement and in respect of family estates not devised, was charged on the fund. *Earl Poulett v. Hood*. 234
2. Legacy and not succession duty held payable on the produce of an estate of a testator sold by trustees. *Earl Howe v. Earl of Lichfield*. 370

*See* EVIDENCE, 2.

LEGACY DUTY.

## SUPPRESSIO VERI.

*See* VENDOR AND PURCHASER, 3.

## SURVIVOR.

The words "survivors and survivor" of parents construed strictly, although the children of some of them took an interest in remainder. *Re Ustick*. 338

*See* SURVIVORSHIP.

## SURVIVORSHIP.

1. Under a bequest to two successively for life, with remainder to the sur-

- vivors of a class :—*Held*, that the survivorship had reference to the death of the last tenant for life. *Re Fox's Will.* Page 163
2. On the marriage of *A.* and *B.*, personalty was limited to them for their lives, and after the decease of the survivor, "leaving one or more child or children then living," on trust "for all and every the child and children" of *A.* and *B.* as *B.* should by will appoint, and, in default of appointment, "upon trust for all and every such child and children" equally. *Held*, that, to entitle a child to take in default of appointment, it was not necessary that he should survive his parents. *In re Gratwick's Settlement.* 215
3. The meaning of the word "survive," in a limitation of property, is, that the person to survive shall be living at the time of the event which he is to survive; it does not mean living at any time whatever after the event referred to. Consequently, a gift over, if there should be no child or remoter issue of *A. B.* who should survive the testator and *A. B.*, and should live to attain twenty-one, is not void for remoteness. *See v. Liddell.* (No. 4.) 658
- See SURVIVOR.*

#### TAXATION.

1. Twelve months after payment of a bill of costs by trustees to their solicitor it cannot be taxed, under

- the 1 & 2 *Vict.* c. 73, upon the application of their *cestui que trust.* *Re Press and Inskip.* Page 34
2. In ordering the taxation of a bill claimed against two persons, the Court gave both liberty to question the retainer, and directed the Taxing Master to distinguish by and to whom each sum found due was to be paid. *Re Kitton.* 369

#### TENANT FOR LIFE.

- A sole trader, by his will, gave "the annual or other earnings, proceeds and profits to arise from his business," to one for life, with remainder over. *Held*, that, in ascertaining these proceeds and profits, interest on his capital in his business was not to be first deducted. *See v. Liddell.* (No. 3.) 631

*See CAPITAL.*

TENANT FOR LIFE AND REMAINDERMAN.

TIMBER.

#### TENANT FOR LIFE AND REMAINDERMAN.

1. Rents and royalties of brickfields, one of which had been leased by the testator and the other by the trustees of his will under a power, *held* to belong to the tenant for life. *Earl Cowley v. Wellesley.* 638
2. The produce of gravel, loam, &c., sold by the trustees according to the course pursued by the testator, *held* income and not *corpus.* *Ibid.* 639
3. Fines for admission received by



the trustees of a manor upon grants of parts of the waste, *held* to belong to the tenant for life. *Earl Comley v. Wellesley*. Page 640

4. Preliminary fines received on enfranchising copyholds by reason of the admission having taken place before *July*, 1853, as is mentioned in the Copyhold Act, 1852 (15 & 16 *Vict.* c. 51), *held* to belong to the tenant for life. *Ibid.* 641
5. Expense of fencing waste lands of a manor granted to a trustee for the benefit of the estate, *held* payable out of *corpus*. *Ibid.*
6. Costs of trustees of rendering the necessary accounts for the purpose of paying the succession duty in respect of the life estate, *held* payable by the tenant for life. *Ibid.* 642

#### TERM.

*See* MERGER.

#### TIMBER.

1. The owner of woodlands had been accustomed, every year, to cut about one-twelfth of the underwood and also such of the trees on the same ground as were likely to obstruct and prejudice the growth of the timber:—*Held*, that the tenant for life under his will was entitled to the produce both of the underwood and trees cut according to that custom. *Earl Comley v. Wellesley*. 635
2. The trustees of a will felled some trees in the woodlands for the purpose of improving the growth of those remaining, but during the

testator's lifetime the trees had not been thinned:—*Held*, as between tenant for life and remainderman, that the produce was capital and not income. *Earl Comley v. Wellesley*. Page 635

#### TITLE.

*See* SPECIFIC PERFORMANCE.

VENDOR AND PURCHASER, 2.

#### TRANSFER.

*See* SHARES.

#### TRANSFER OF SHARES.

1. By the deed of settlement of a company, shares might be transferred to any person approved by the court of directors; but it provided that no person should be entitled to become a transferee unless and until he should be approved of by the Court:—*Held*, that the power of rejection must be exercised reasonably, and that a refusal to make any transfer would not be a reasonable exercise of it. *Robinson and The Alliance Bank v. The Chartered Bank of India, &c.* 79
2. A general demurrer to a bill filed by a shareholder against directors, who had a discretionary power of objecting to a transferee, to compel them to approve of a transfer to some proper person, overruled, the bill alleging, in substance, that they had refused to make any transfer at all. *Ibid.*

#### TRUST.

1. Money which was standing in the



funds in the name of a married woman, was claimed after her decease and that of her husband, by her mother, as having been invested by her while separated from her husband in her daughter's name. The only evidence of the trust was the affidavit of the mother and proof that the dividends had been received by her with the assent of the daughter and her husband. The Court held the claim of the mother established. *Donn v. Ellis*. Page 578

2. A testator bequeathed 2,000*l.* on certain trusts, and he empowered his executor, who was also his residuary legatee, to retain the amount in his hands uninvested, he paying interest thereon. After the testator's death, the executor, being satisfied that the testator intended to bequeath 3,000*l.*, and not 2,000*l.*, promised to make it up 3,000*l.*; he made no investment, but continued to pay interest on the 3,000*l.* to his death:—*Held*, that there was a complete voluntary trust as to the additional 1,000*l.*, which this Court would enforce. *Gee v. Liddell*. (No. 1.)

621

See MORTGAGE, 1.

NOTICE, 1, 2.

STATUTE OF FRAUDS.

VOLUNTARY GIFT.

#### TRUSTEE.

1. A testator appointed *A. B.* (the tenant for life) and *C. D.* trustees. The will contained no power to appoint new trustees. *C. D.* having

disclaimed, *A. B.* (under the powers of the 23 & 24 *Vict.* c. 145, s. 27), appointed a single trustee in his place:—*Held*, that the other *cestuis que trust* were entitled to have a third trustee appointed, and that the statute did not take away the jurisdiction of the Court to increase the original number of trustees. *The Viscountess D'Adhemar v. Bertrand*. Page 19

2. Trustees under a creditors' deed, in the Form D. of the Bankrupt Act, realized the assets, but the deed afterwards proved invalid (the requisite number of creditors not having assented to it) and the debtor was made bankrupt:—*Held*, that the trustees were not entitled to their costs and expenses of administering the estate, the deed under which they acted being totally void. *Smith v. Dresser*.

378

3. The right of a trustee to be indemnified out of the trust property is the first charge thereon, and it has priority to any charge created upon it by the *cestuis que trust*. And, consequently, the right of a trustee of a public company to be indemnified out of the property has priority over the debenture creditors. *Re The Exhall Coal Company (Limited)*. *Re Bleckley*.

449

4. A trustee employed a solicitor to invest trust money. The solicitor, who was steward of the manor, sent to the trustee some title deeds and a copy of a surrender of copyholds to secure the trust money,

but misapplying the trust money ; the pretended surrender had really no existence. *Held*, that the trustee was liable to make good the loss. *Bostock v. Floyer*. Page 603  
See COPYHOLDS.

## FINES.

POWER TO APPOINT NEW TRUSTEES.

## TRUSTEE ACT.

See COPYHOLDS.

## ULTRA VIRES.

See COMPANY, 2.

## UNCERTAINTY.

1. By his will, the testator gave his residue amongst his nephews and nieces, excluding "*John*" *Skutt*. By a codicil, he varied the limitation to this class, and excluded "*William*" *Skutt* "as in his said will was directed." *Held*, that the exclusion was void for uncertainty, and that they both took a share. *Cope v. Hensham*. 420
2. A testator devised to each of his four daughters a house and garden at G., to be built at the expense of his executors. A daughter M., requiring the house, one was built with a garden by D., the executor, who was also residuary legatee and devisee :—*Held*, after the death of D., that the gift was not void, and that M. was entitled to the house and garden. *Edwardes v. Jones*. (No. 2.) 474

## VENDOR AND PURCHASER.

1. After some negotiations, a landlord, by his agent, stated, in a letter to the tenant, the terms on which he would renew his lease, but added, he would expect an answer within a month. The landlord died seven days afterwards, and on the following day, the tenant and agent, both of whom were then ignorant of the death, met, and the tenant signed his acceptance of the terms :—*Held*, that there was no binding contract. *Carr v. Livingston*. Page 41
  2. Where a person sells property which he is neither able to convey or to enforce a conveyance from other proper parties, the purchaser may repudiate the contract, and is not bound to wait to see if the vendor can induce some third person to join in making a good title. *Forrer v. Nash*. 167
  3. The doctrine of *suppressio veri* applied to a purchaser. *Summers v. Griffiths*. 27
- See AFFIDAVIT OF DOCUMENTS.  
BUILDING LAND.  
EVIDENCE, 2.  
LIEN.  
RESCINDING CONTRACT.  
REVERSION.  
SALE UNDER COURT.  
SETTING ASIDE DEED.  
SPECIFIC PERFORMANCE.

## VENDOR'S LIEN

1. The owners of land taken by public companies under their compulsory powers have the ordinary vendor's lien for unpaid purchase-money, and they are entitled to

enforce that right by a sale of the land. *Walker v. The Ware, &c., Railway Company.* Page 52

2. This lien extends not only to the value of the land, but also to the amount of compensation for damages. *Ibid.*
3. This right of lien is unaffected by the deposit under the 85th section of the Lands Clauses Consolidation Act, and by a deposit, by agreement, before the amount payable has been ascertained. *Ibid.*
4. The rights of the public, and of debenture creditors and others claiming under the company are subordinate to the vendor's lien for unpaid purchase-money. *Ibid.*

*See LIEN.*

MARSHALLING.

#### VESTRY.

*See RIGHT OF WAY, 1.*

#### VOLUNTARY DEED.

The construction of and the rights and incidents under a voluntary deed, if *bond fide* and valid, are the same as of a deed for value. *Dickinson v. Burrell.* 257

#### VOLUNTARY GIFT.

1. A person voluntarily gave his promissory note to trustees for his natural child, and deposited with them the title-deeds for the purpose of carrying into effect his intention as to the promissory note:—*Held*, that a valid trust had been created. *Arthur v. Clarkson.* 458
2. Distinction between enforcing the

performance of a complete voluntary trust and enforcing the completion of an incomplete one. *Gee v. Liddell.* (No. 1.) Page 621

#### VOLUNTARY SETTLEMENT.

1. The principle of this Court, established by a great number of cases, is, that it will not interfere between volunteers (in the legal sense of the term), but will leave them to their remedy at law, whatever that may be. The Court will neither, at the instance of the donor who repents his gift, cause the deed of gift to be delivered up, nor will it, at the instance of the donee, interfere to complete an imperfect deed of gift. *De Hoghton v. Money.* 98
2. A purchaser for value of real estate cannot come into the Court of Chancery to have a prior voluntary deed, void under the 27th *Eliz. c. 5*, delivered up to be cancelled. The Court, in such a case, leaves both parties to their legal rights and remedies. *Ibid.*
3. *A. B.* entered into a voluntary agreement as to a leasehold with *C. D.*, and he afterwards contracted to sell it to *E. F.* for valuable consideration:—*Held*, that a suit by *E. F.* against *A. B.* and *C. D.*, to have the rights of the parties declared and the voluntary agreement cancelled, could not be maintained. *Ibid.*

#### VOLUNTARY TRUST.

*See TRUST, 2.*

VOLUNTARY GIFT.

## WILL.

"Effects" held to be *ejusdem generis*,  
and not to apply to real estate.  
*Cross v. Wilks.* Page 562

## See ACT OF PARLIAMENT.

CAPITAL.

CHARGE ON REAL ESTATE.

CLASS.

CONDITION.

CONTINGENT LEGACY.

CONVERSION.

CORPUS AND INCOME.

DESCRIPTION.

DEVISE.

DISJUNCTIVE.

FAMILY TRUST.

FORFEITURE, 1.

HEIRS.

HOSPITAL.

LAPSE.

MARSHALLING.

MERGER.

MISCALCULATION.

MONEY.

MORTGAGE, 2.

POWER.

PRECATORY TRUST.

RECITAL.

REMOTENESS.

RIGHT HEIRS.

SATISFACTION.

SUBSTITUTION.

SUCCESSION DUTY.

SURVIVOR.

SURVIVORSHIP.

TENANT FOR LIFE.

TENANT FOR LIFE AND RE-  
MAINDERMAN.

TRUST, 2.

TRUSTEE, 1.

UNCERTAINTY.

## WINDING-UP.

1. The Court will not, under the 25 & 26 *Vict.* c. 89, s. 100, make an order *ex parte* for the delivery over of documents by the manager of a company to the Official Liquidator. *In re The Commercial Union Wine Company.* Page 35

2. The fact of a company having neglected to pay a debt three weeks after demand made, under the 25 & 26 *Vict.* c. 89, ss. 79, 80, is not sufficient to entitle the creditor to a winding-up order, unless it be shown that the company is also unable to pay its debts. Where a debt is disputed by a company, a petition by the creditor to wind it up will not be allowed to stand over, unless it is believed that when the debt has been established by a judgment, such judgment could not be enforced against the company. *Re The London Wharfing & Warehousing Company (Limited).*

37

3. The provisions in the 25 & 26 *Vict.* c. 89, ss. 79, 80, for winding up a company, in default of its paying a debt three weeks after notice, do not apply where there is a *bond fide* dispute as to the amount due, though there may be an admitted debt exceeding 50*l.* *Re The Brighton Club and Norfolk Hotel Company (Limited).* 204

4. The Court cannot direct payment, in full, to a clerk in a company which is being wound up of three months' arrears of salary, as in the case of a bankruptcy, but he must

come in *pari passu* with the other creditors of the company. *Re The General Rolling Stock Company (Limited)*. Page 207

5. The order to wind up a company is notice to the servants of the company of their discharge from its service. *Ibid*.

6. During a voluntary winding up, an action having been brought against the Company on bills of exchange, the Court stayed execution only, and directed the costs to be added to the debt. *The Peninsular, &c. Banking Company*. 280

7. Rules as to costs upon petitions to wind up public companies. When the Court makes no order on a petition to wind up, the shareholders supporting it get no costs, and the shareholders resisting it get no costs unless personally assailed. But when the Court makes the winding-up order, the shareholders or creditors supporting it get one set of costs between them. *Re The Humber Iron Works Company*. 346

8. Under a winding up of a company, a party claiming as a creditor must either submit to produce all documents in his possession relating to his claim, or it will be disallowed. *Re The Constantinople and Alexandra Hotel Company*. 349

9. Liberty to a mortgagee, pending a winding up, to institute a suit for foreclosure refused, there being no special difficulty, and it being competent to him to obtain the

proper order in Chambers without the necessity of a suit. *In re St. Cuthbert Lead Smelting Company*. Page 384

10. The words "just and equitable that the company should be wound up" in the 5th rule of the 79th section of "The Companies Act, 1862," are to be considered *ejusdem generis* with the four prior rules. *In re The Anglo-Greek Steam Navigation and Trading Company (Limited)*. 399

11. If it were established that a company never had any proper foundation, and that it was a mere fraud or bubble company, the Court would order it to be wound up. *Ibid*.

12. Misconduct of directors and manager towards the shareholders, though a ground for relief by suit, is not, until such mismanagement has produced insolvency, a ground for winding up the company. *Ibid*.

13. The first appearance of the advertisement to wind up a company determines the position of all the shareholders, but up to that time it is open to them to deal exactly as if the company were not about to be wound up, provided the transaction be *bond fide*. *In re London, Hamburg, &c., Bank. Emmerson's Case. Toombs' Case*. 518

14. A. sold shares in a company to B., both being ignorant at the time that a petition had been presented to wind up the company, and upon which an order was subsequently made:—*Held*, that notwithstanding

the 84th and 114th sections of "The Companies Act, 1862," there was a valid and binding sale. *In re London, Hamburg, &c., Bank. Emmerson's Case. Toombs' Case.*

Page 518

15. Under the above circumstances the Master of the Rolls held that he had authority under that act to deal with the case, and he placed the purchaser on the list in lieu of the vendor, whose name had remained on the register. The Lords Justices concurred in thinking that

the Court had such authority, but *held* that the circumstances were such that the Court could not specifically perform the contract. *In re London, Hamburg, &c., Bank. Emmerson's Case. Toombs' Case.*

Page 518

16. Practice as to appointing Provisional Liquidators. *Ibid.*

*See AFFIDAVIT.*

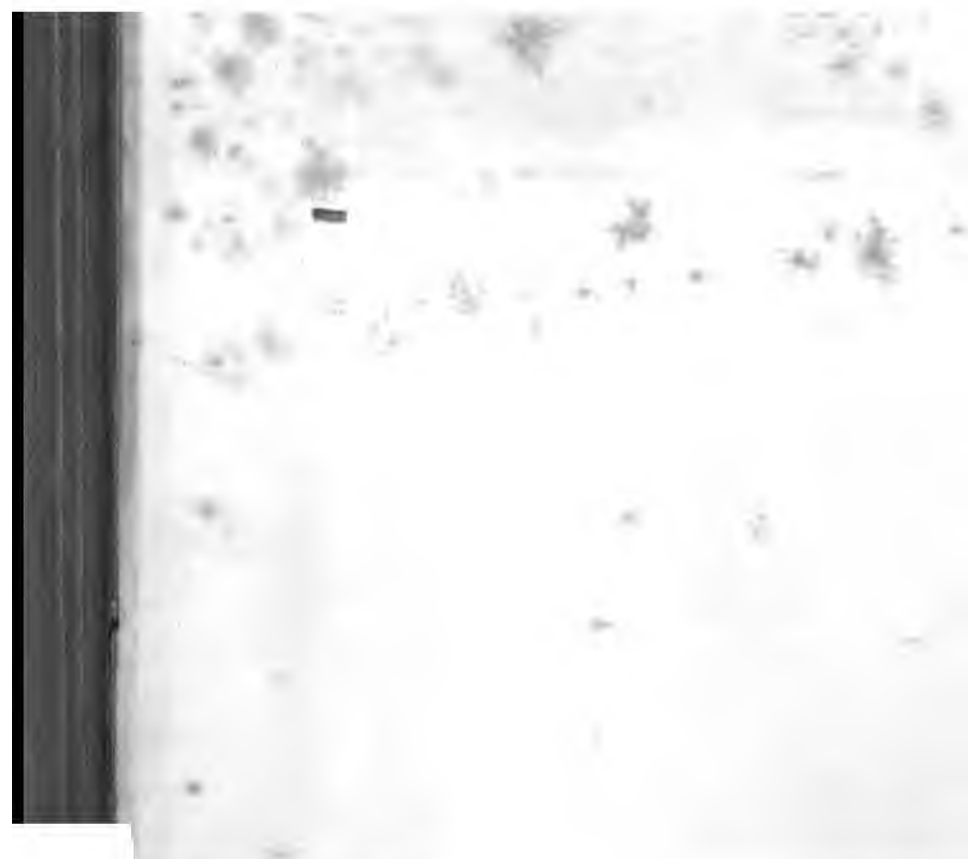
COMPANY, 1.

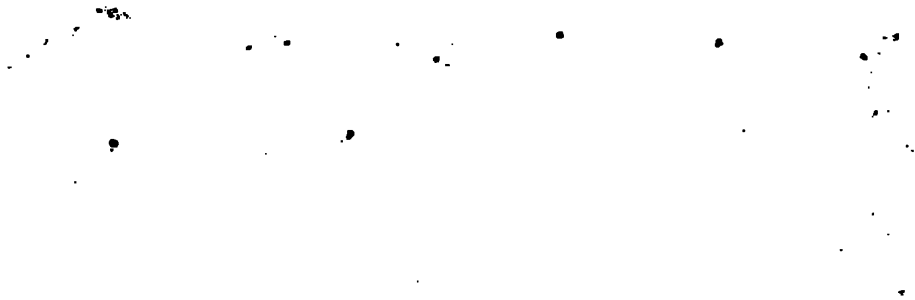
CONTRIBUTORY.

COSTS, 7.









/

1. The first part of the document is a list of names and addresses of the members of the committee.

2.

3.

4.

5.

6.

7.

8.

9.

10.

11.

12.

13.

14.



